LIBRARY
SUPREME COURT, U. S.

NOV 6 1967
JOHN F. DAVIS, CLERK

No. 787

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

TEITEL FILM CORPORATION, a corporation, and CHARLES TEITEL,

Appellants,

vs.

JOHN F. CUSACK, NER LITTNER, MARY MUELLER, HENRY RAGO and MATTHEW SCHOENBAUM, Members of the Motion Picture Appeal Board of the City of Chicago,

Appellees.

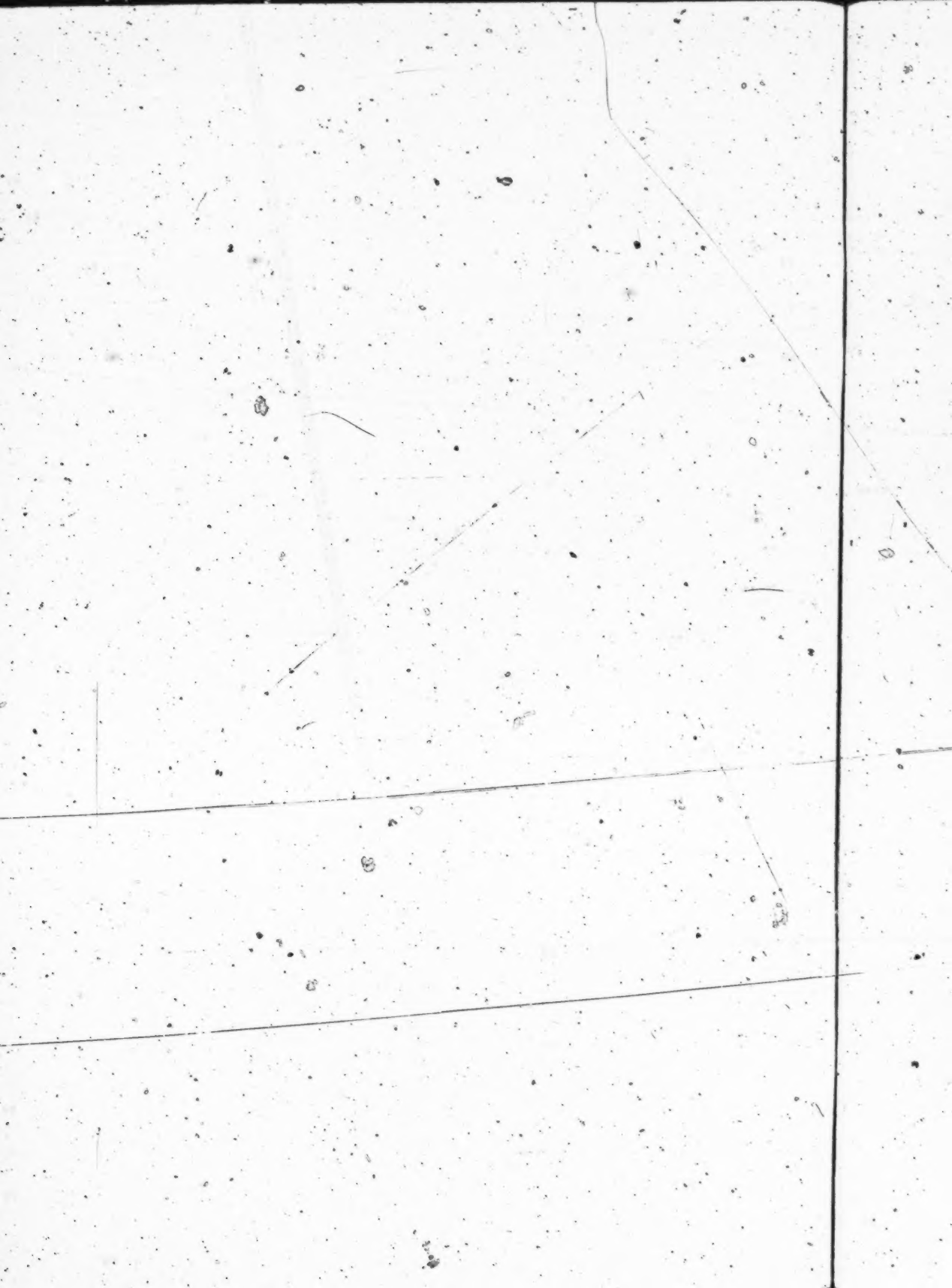
Appeal from the Supreme Court of Illinois.

STATEMENT AS TO JURISDICTION

ELMER GERTZ
120 South LaSalle Street
Chicago, Illinois 60603
312—RA 6-6116

LEON N. MILLER
33 North Dearborn Street
Chicago, Illinois 60602
312—RA 6-2155
Attorneys for Appellants

The Scheffer Press, Inc.—ANdover 3-6850



INDEX

	PAGE
Opinions Below	1
Grounds on which Jurisdiction of this Court is Invoked	2
Questions Presented	3
Statement of the Case	3
The Question is Substantial	9
Conclusion	16
Appendix A—Chicago Motion Pictures Censorship Ordinance	1a
Appendix B—Amendment to Chicago Motion Pictures Censorship Ordinance	6a
Appendix C—Opinion of Circuit Court in case 66 CH 748	8a
Appendix D—Opinion of Circuit Court in case 66 CH 1411	10a
Appendix E—Opinion of Supreme Court of Illinois	12a

Authorities.

Sections of the United States Constitution

First Amendment 2, 3, 16

Fourth Amendment 2, 3, 11, 16

Fourteenth Amendment 2, 3, 11, 16

Table Of Cases.

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 83 S.Ct. 631 (1963) 3, 10

Commercial Pictures Corp. v. Regents, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329 (1954) 4

PAGE

Dunn v. Maryland State Board of Censors, 240 Md. 249, 213 A.2d 751 (1964) 15

Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734 (1965) 2, 8, 9, 10, 12, 13, 14

Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002 (1952) 4

Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943) 2

John P. King Mfg. Co. v. Augusta, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801 (1928) 2

Joseph Burtsyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) 2

Kingsley Books, Inc. v. Brown, 345 U.S. 436, 77 S.Ct. 1325 (1957) 3, 14

Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362 (1959) 4

Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957) 14

Superior Films, Inc. v. Dept. of Education, 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329 (1954) 4

United States v. Klaw, 350 F.2d 155 (2d Cir. 1965).. 15

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665 (1948) 4

STATUTES.

28 U.S.C. § 1257(2) 2

Municipal Code of the City of Chicago, chapter 155 ....2, 3, 5, 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No.

TEITEL FILM CORPORATION, a corporation, and CHARLES TEITEL,

Appellants,

vs.

JOHN F. CUSACK, NER LITTNER, MARY MUELLER, HENRY RAGO and MATTHEW SCHOENBAUM, Members of the Motion Picture Appeal Board of the City of Chicago,

Appellees.

Appeal from the Supreme Court of Illinois.

STATEMENT AS TO JURISDICTION

(A) Opinions Below

The opinion of the Supreme Court of Illinois affirming the orders of the Circuit Court of Cook County is not yet reported. The opinions of the Circuit Court are not reported. The opinions of both said courts are appended hereto, as Appendices "C", "D", and "E".

(B) Grounds on Which Jurisdiction of this Court is Invoked.

(i) This is an appeal to the Supreme Court of the United States from a final judgment of the Supreme Court of Illinois affirming orders of the Circuit Court of Cook County enjoining the showing of two films in the City of Chicago, pursuant to Chapter 155 of the Municipal Code of the City of Chicago. Defendants had appealed the orders of the Circuit Court on the grounds that the films are not obscene and that the censorship scheme set up in said ordinance is repugnant to the First, Fourth and Fourteenth Amendments to the United States Constitution as construed in *Freedman* v. *Maryland,* 380 U.S. 51, 85 S.Ct. 734 (1965). The Illinois Supreme Court upheld the validity of the ordinance and found the films obscene.

The ordinance of the City of Chicago, the validity of which is challenged, is contained in chapter 155 of the Municipal Code of the City of Chicago, sections 155-1 through 155-7.4.

(ii) The date of the judgment of the Supreme Court of Illinois sought to be reviewed is September 29, 1967. The notice of appeal to this Court was filed on October 17, 1967, in the Supreme Court of Illinois.

(iii) The federal statutory provision believed to confer on this Court jurisdiction of the appeal is 28 U.S.C. §1257(2).

(iv) The cases believed to sustain the jurisdiction are: *John P. King Mfg. Co.* v. *Augusta,* 277 U.S. 100, 103-4, 114, 48 S.Ct. 489, 72 L.Ed. 801 (1928); *Jamison* v. *Texas,* 318 U.S. 413, 414, 63 S.Ct. 669, 87 L.Ed. 869 (1943); *Freedman* v. *Maryland,* 380 U.S. 51, 85 S.Ct. 734 (1965);

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631 (1963); and *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 77 S.Ct. 1325 (1957).

(v) The validity of the entire censorship scheme set up in chapter 155 of the Municipal Code of the City of Chicago is challenged. The ordinance appears at pages 1313 through 1316 of the Municipal Code of Chicago. Since these provisions are lengthy, the pertinent text is appended hereto as Appendices "A" and "B".

(C) Questions Presented

1. Whether the Chicago Motion Pictures Censorship Ordinance, found in Chapter 155 of the Municipal Code of the City of Chicago, is unconstitutional under the First, Fourth and Fourteenth Amendments to the United States Constitution, in itself and as applied; and

2. Whether the films involved herein are obscene.

(D) Statement of the Case

As is shown hereinafter, 58 or 63 days of delay (depending upon classification) is built into the Chicago Motion Pictures Censorship Ordinance (the Illinois Supreme Court mistakenly says it is only 50 days); unlimited delay is built into the trial court level (in these cases it took 6 months and might have taken longer); and unlimited delay is built into the appellate level (in these cases it took 12 months and might have taken longer). In all, it took 20 months for a final decision upon the constitutional status of these films, and there is nothing in the ordinance, state statutes or court rules that could have prevented longer delays—prior restraints beyond any permissible constitutional limits.

The motion picture censorship ordinance of the City of Chicago provides that before any moving picture film may be shown in public in the City of Chicago, it must be submitted to the Superintendent of Police for inspection and issuance of a permit. A permit fee is charged, based upon the length of the film. If a film

> "is obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the superintendent of police to refuse such permit; otherwise it shall be his duty to grant such permit." (§ 155-4, App. 2a-3a)

This definition goes far beyond the permissible limits of restraint or prosecution, according to the guidelines of the United States Supreme Court. Several similar tests have been held invalid: *Winters* v. *New York,* 333 U.S. 507, 68 S.Ct. 665 (1948) ("devoted to the publication . . . of criminal news" or stories of deeds of bloodshed, lust or crime); *Joseph Burtsyn, Inc.* v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (sacrilegious material); *Gelling* v. *Texas,* 343 U.S. 960, 72 S.Ct. 1002 (1954) (of such a character as to be prejudicial to the best interests of the people of the city); *Commercial Pictures Corp.* v. *Regents,* 346 U.S. 587; 74 S.Ct. 286, 98 L.Ed. 329 (1954) (immoral and would tend to corrupt morals); *Superior Films, Inc.* v. *Dept. of Education,* 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329 (1954) (requirement that the film be of a "moral educational or amusing and harmless character"); and *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684, 79 S. Ct. 1362 (1959) (portray acts of sexual immoral-

ity . . . as desirable, acceptable or proper patterns of behavior).

At the time these cases arose, the superintendent of police was required either to grant or deny the permit within three days after inspecting the film, but he was under no duty to inspect the film within any specified period of time. While these cases were pending, the ordinance was amended to require him to inspect the films within three days of the receipt thereof. (See Appendix "B")

The ordinance also provides for a Motion Picture Appeal Board. If the superintendent of police finds the film obscene, there is no automatic judicial review—the applicant for a permit may file a written request for review with the Appeal Board within seven days. Within fifteen days of receipt of request for review, the Board must review the film and within fifteen days after so reviewing it, must give the applicant an opportunity to present testimony and argument in support of exhibition of the film. Within five days after the hearing, a ruling must be made in writing and served upon the applicant. If the Board determines that the film is obscene, it must file an action in the Circuit Court of Cook County, seeking an injunction against the showing of the film.

In December, 1965, and January, 1966, respectively, defendants submitted the two films involved herein to the superintendent of police for permits to exhibit them publicly. The superintendent refused to issue permits on the ground that the films were obscene. On January 5, 1966, and February 9, 1966, respectively, defendants applied for reviews of these rulings by the Appeal Board.

On January 25, 1966, the Board viewed "Rent-a-Girl" and held a hearing thereon on January 31, 1966. It

decided, by a four to one vote, to uphold the determination that the film was obscene, and on February 9, 1966, filed a complaint in the Circuit Court, seeking a permanent injunction against the exhibition of the film in public. Defendants were not served with summons until February 21, 1966.

On February 28, 1966, the Board viewed "Body of a Female" and held a hearing thereon on March 7, 1966. It decided by a three to two vote, to uphold the determination that the film was obscene, and on March 11, 1966, filed a complaint in the Circuit Court seeking a permanent injunction against the exhibition of the film in public. Defendants were not served with summons until March 18, 1966.

On March 18, 1966, and April 14, 1966, respectively, within the period provided by statute and rule of court, the defendants moved to strike and dismiss the complaints, which motions were granted, with leave to the Board to file amended complaints. The Board filed amended complaints in both cases on May 20, 1966, and from that point on all proceedings in both cases were informally consolidated. On March 27, 1966, defendants filed motions to strike and dismiss the amended complaints on the grounds, among others, that the retention of the films by the Appeal Board was an unconstitutional seizure; that the ordinance upon which the amended complaints were predicated was unconstitutional; that the delay from the filing of the complaints until the time of the motions was an unconstitutional impairment of freedom of expression and security of one's property; that the amended complaints failed to attach the transcripts of proceedings before the Board; that the allegations of the amended complaints did not state facts, but only legal conclusions; that the basis for the allegations of obscenity were improper; and that the films were not obscene.

On May 31, 1966, defendants moved for a hearing on their motions, which was finally held on June 27, 1966. The delay was occasioned by the court's unwillingness to hold an earlier hearing. No evidence was heard by the court, but the films were viewed.

After argument on defendants' motions, the trial judge filed memorandum opinions in both cases on August 3, 1966; and on August 8, 1966, entered orders in both cases permanently enjoining defendants from exhibiting the films in public places, or in places where the public is admitted, in the City of Chicago, and upholding the ordinance.

The Circuit Court of Cook County has a rule purportedly requiring a hearing in moving picture censorship cases within five days of answer. This rule does not apply to the instant situation in which there were motions to strike the complaints. It does not require the chancellor to rule upon the matter within any definite period, long or short. Both counsel for plaintiffs and the court stated that the rule was inapplicable and ignored it completely.

Defendants filed their notices of appeal to the Supreme Court of Illinois on August 24, 1966, and praecipes for record on August 25, 1966, and the cases were then consolidated for review. They filed their brief and argument on October 24, 1966. On November 10, 1966, the Board moved for an extension of time in which to file its answering brief, to and including January 15, 1967. Defendants were not given notice of this motion until after it had been allowed, and informed the Board's attorney that they would oppose any further delays as an impairment of their constitutional rights.

On January 12, 1967, the Board asked for another extension of time to and including March 15, 1967, in

which to file its brief. Defendants, citing *Freedman* v. *Maryland* and claiming impairment of their constitutional rights, objected to this motion by telegram, but the delay was granted by the Illinois Supreme Court.

Again, on March 13, 1967, the Board moved for an extension of time to and including April 15, 1967, in which to file its brief. Defendants opposed this delay most strongly and filed a memorandum in support of their objections. This extension of time was granted by the Illinois Supreme Court, and the Board finally filed its brief on April 15, 1967.

Defendants filed their reply brief on April 24, 1967, in a period shorter than provided by court rule, and oral argument on the case was heard on May 11, 1967. The opinion of the Illinois Supreme Court was filed on September 29, 1967.

The two memorandum opinions of the trial judge were almost completely identical. He found that both films were obscene within the meaning of the ordinance in that:

> "(a) To the average person, applying contemporary community standards, both national and local, the dominant theme of the film taken as a whole appeals to prurient interest, that is to a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.
>
> (b) The film is utterly without redeeming social, artistic, literary or scientific importance.
>
> (c) The film is patently offensive, that is, it affronts current community standards of decency.
>
> (d) When considered as a whole, the calculated purpose of the film is substantially to arouse sexual desires in the normal, average person." (8a-9a, 10a-11a)

As to the constitutionality of the censorship scheme, the trial judge merely stated that it was constitutional in that:

> "(a) The burden of taking court action to enjoin a film as obscene is upon the Motion Picture Appeal Board of the City of Chicago.
>
> (b) The licensing and review procedures outlined in Chapter 155 afford the applicant Due Process." (9a, 11a)

The decrees of court followed the court's opinions in language and effect.

The Supreme Court of Illinois discussed the constitutionality of the Chicago Movie Censorship ordinance on the various pages of its opinion. The court held that the requirements laid down by this Court in *Freedman* v. *Maryland* were satisfied by the ordinance, in that, initially, the Motion Picture Appeal Board was required to institute judicial proceedings to restrain showing of the films which it had found to be obscene. After noting that it took nine and eleven months respectively for a trial court judicial decision on the obscenity of the films, the court held, on page 19a of the Appendix:

> "After careful consideration, however, we find it unnecessary to resolve the question of whether plaintiffs or the defendants caused all of the delay. We look rather to the ordinance itself, in the light of *Freedman* and subsequent cases, and conclude that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants."

(E) The Question is Substantial

It is clear that under the Chicago ordinance and the procedures of the Illinois Courts, the time required for a final judicial determination of obscenity bears no relation-

ship whatsoever to the guidelines set down by this Court in *Freedman* v. *Maryland*. Rather than making a good faith attempt to comply with those requirements, the City of Chicago and the Illinois judiciary have ignored them.

The municipal scheme is bilevel, requiring not one but two administrative steps, consuming 58 days, thus inevitably and unduly prolonging the time which must pass before judicial proceedings are begun. Furthermore, the City of Chicago does not have plenary power over the courts, and is powerless to require prompt judicial hearings, once the lengthy administrative proceedings are finally completed. While the Chicago ordinance does require the Motion Picture Appeal Board to commence a suit for injunction in the Circuit Court to enjoin the showing of any motion picture found by it to be obscene, there is no requirement that the plaintiffs in such an action expedite the proceedings. In fact, as is indicated in the facts in these cases, the Board has done just the opposite, delaying the proceedings time and time again over defendants' vigorous protests.

In *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631 (1963), this Court stated:

> "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity. [citing cases] We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the validity of the restraint."

The actions of both the Circuit Court and Illinois Supreme Court show that the judiciary in Illinois makes no effort whatsoever to assure "an almost immediate judicial determination of the validity of the restraint."

The suits for injunction were filed in the Circuit Court on February 9, 1966, and March 11, 1966, respectively. Hearings were not held until June 27, 1966, after which the trial judge delayed until August 3 before filing his memorandum opinions. At no time did defendants request any delay, but indicated their willingness to proceed when the plaintiffs requested a delay. One order of court expressly stated that defendants were ready to proceed but the matter was continued for a considerable period. The attitude of the trial judge is succinctly stated by him thusly:

> "First amendment matters cannot be any more important than any other constitutional right or any other citizen's right to have his case heard.
>
> "As I said before, it is far more important in my judgment to take care of the broken heads and fractured legs than it is to take care of bleeding hearts."

The Illinois Supreme Court seems to have been no more cognizant of this Court's rulings in this area than the trial court. Under the Illinois Supreme Court Rules in effect at the time, the plaintiffs had 20 days after the due date of defendants' brief within which to file their brief. On November 10, 1966, however, plaintiffs presented a motion for an extension of time to and including January 15, 1967, to file their brief. Defendants were not notified of this action until November 15, 1966, at which time defendants' counsel sent a letter to plaintiffs' counsel, pointing out this fact, and stating that "since a major point made by us before Judge Harrington and in our brief is that the delay constitutes a denial of due process, we can hardly agree to further delay and further denial of due process." On January 12, 1967, plaintiffs filed

another motion to extend the time for them to file their brief to March 15, 1967. Defendants immediately sent the following telegram to the Clerk of the Illinois Supreme Court:

> "Please call the court's attention to our strong objections to Appellees' request for another long delay in filing Appellees' brief and additional abstract. Such prolonged delay does violence to the holding of the United States Supreme Court in *Freedman* v. *Maryland*, 380 U.S. 51, as set forth under 1 on pages 11 to 26 of Appellants' brief, which we tender as suggestions in opposition. Shall we file more formal objections."

Despite these objections, the Illinois Supreme Court granted the extension. Not satisfied with these delays of four months, on March 13, 1967, the plaintiffs requested yet another month's extension of time to file their brief. In response to this request the defendants filed five pages of objections. In these objections defendants detailed the proceedings which had gone before, and the numerous delays involved. Defendants pointed out the ruling of this Court in *Freedman* v. *Maryland*, and noted that in a case then pending in the United States District Court for the Northern District of Illinois, District Judge Decker had taken notice of the four-month extension of time requested by the plaintiffs in our cases and stated in reference thereto:

> "Although there may be a reasonable explanation for this extraordinary delay at the City's request, the face of the record before me demonstrates that there is grave doubt whether the present system sufficiently assures an applicant of the shortest possible judicial review."

Despite these objections, the Illinois Supreme Court granted the extension of time, although it did state that this was the last extension it would grant.

After receiving plaintiffs' brief, defendants filed their reply brief before the due date so as to expedite matters. Oral argument was set two and one-half weeks later, but the Illinois Supreme Court then delayed another four and one-half months after the oral argument before handing down its decision. It could have delayed even longer, because there is no statute or rule requiring a more expeditious determination.

In its opinion, the Illinois Supreme Court did not seem to be aware of the fact, pointed out to it repeatedly, that this Court's ruling in *Freedman* applied to appellate proceedings as well as proceedings held at the administrative and trial level. After noting that the elapsed time from the submission of the films to the Superintendent of Police to the final order of the trial court was nine and eleven months respectively, the court merely held:

> "After careful consideration, however, we find it unnecessary to resolve the question of whether plaintiffs or the defendants caused all of the delay. We look rather to the ordinance itself, in the light of *Freedman* and subsequent cases, and conclude that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants." (19a)

This holding was made in the face of the statement of this Court in *Freedman* that an initial judicial determination of four months and a final vindication on appellate review of six months was too long. 380 U.S. at 55.

It is clear that there is nothing whatsoever in either the Chicago ordinance, any statute, or the rules of the

Illinois courts which guarantees a film distributor or exhibitor that he will receive an immediate or even a reasonably prompt judicial determination on the question of obscenity. There is nothing in the statutes or court rules which requires a ruling within any specified period of time. The proceedings are open-ended and the actions in these cases conclusively show that the courts will make no efforts to expedite cases such as this, but rather that they are all too willing to delay the proceedings indefinitely. This flies directly in the face of this Court's clear and explicit guidelines. *Freedman* v. *Maryland*, 380 U.S. 51, 85 S.Ct. 734; *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 77 S.Ct. 1325.

In finding these films obscene, the trial judge set out in his opinion various standards which he felt were transgressed by these films. In addition to the standards approved by this Court, he also applied the following standard: "When considered as a whole, the calculated purpose of the film is substantially to arouse sexual desires in the normal average person." This standard is clearly irrelevant and improper. This court has made it clear time and time again that sex and obscenity are not synonymous. *Roth* v. *United States*, 354 U.S. 476, 487, 77 S.Ct. 1304 (1957).

The Illinois Supreme Court realized that this standard was improper, but held that since the trial judge had also stated the approved guidelines in his opinion, "the consideration of additional, unapproved, guidelines does not deprive the defendants of any constitutional protection." This holding is clearly erroneous. The trial judge made no distinction between the various standards which he used in finding these films obscene. Who can say that the consideration of improper standards, particularly one

which has been directly disapproved by this court, did not have a prejudicial effect upon his decision?

Another gross infirmity in the procedure before the trial court, countenanced by the Illinois Supreme Court, is the failure of the plaintiffs to offer any evidence whatsoever to support their conclusion that these films are obscene. The nature of the tests for obscenity are such that it is virtually impossible for a single judge, or even a panel thereof, to have direct knowledge of contemporary community standards. The Illinois Supreme Court specifically held that a viewing of the subject films alone is sufficient basis upon which to make a judgment of obscenity. In some few cases this may be so, but in the close areas this is clearly insufficient, unless Courts are to set themselves up as experts on contemporary community standards. In this connection, see *Dunn* v. *Maryland State Board of Censors,* 240 Md. 249, 213 A.2d 751, 754 (1965) and *United States* v. *Klaw,* 350 F.2d 155, 167 (2d Cir. 1965).

While the Illinois Supreme Court sets out the proper standards of obscenity in its opinion, its discussion of the films themselves shows that it did not follow these standards seriously. The court indicates that if the films are obscene, they have no social importance, and does nothing to consider seriously whether the films in fact have any social importance, stating instead that they deal with sexual deviations which can only appeal to those with a shameful and morbid interest in nudity and sex. This conclusion is drawn without any evidence whatsoever as to the actual appeal of these films.

Even more striking is the fact that in neither case was the Motion Picture Appeal Board unanimous in its determination that the films were obscene. The votes were

four-to-one and three-to-two, respectively. It is also interesting to note, as set forth in an exhibit to the complaint, that the film "Rent-a-Girl" (where the court split four-to-one) has been playing in several cities throughout the country without censorship objection.

These facts clearly indicate that the issue of obscenity is not as obvious as the Illinois Supreme Court would have it appear. Reasonable men differ about these films, and where this is the case, it is ludicrous that freedom of expression depends upon a bare majority vote. Just as there should be no balancing of good against bad components, there should be no impairment of freedom where reasonable differences may exist. *Jacobellis* v. *Ohio,* 378 U.S. 184.

CONCLUSION

For the above indicated reasons, we respectfully submit that this Court should find that it has jurisdiction of this appeal and that the Chicago Motion Pictures Censorship Ordinance should be reviewed and found to be unconstitutional under the First, Fourth, and Fourteenth Amendments to the Constitution of the United States.

Dated at Chicago, Illinois: November 3, 1967.

Respectfully submitted,

ELMER GERTZ
LEON N. MILLER
Attorneys for Appellants

APPENDIX A.

MOTION PICTURE CENSORSHIP ORDINANCE OF THE CITY OF CHICAGO

Chapter 155 of the Municipal Code of the City of Chicago

155-1. It shall be unlawful for any person to show or exhibit in a public place, or in a place where the public is admitted, anywhere in the city any picture or series of pictures of the classes or kinds commonly shown in mutoscopes, kinetoscopes, or cinematographs, and such pictures or series of pictures as are commonly shown or exhibited in so-called penny arcades, and in all other automatic or motion-picture devices, whether an admission fee is charged or not, without first having secured a permit therefor from the superintendent of police.

It shall be unlawful for any person to lease or transfer, or otherwise put into circulation, any motion-picture plates, films, rolls, or other like articles or apparatus, from which a series of pictures for public exhibition can be produced, to any exhibitor of motion pictures, for the purpose of exhibition within the city, without first having secured a permit therefor from the superintendent of police.

The permit herein required shall be obtained for each and every picture or series of pictures exhibited and is in addition to any license or other imposition required by law or other provision of this code.

Any person exhibiting any picture or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit.

All films exclusively portraying current events or pictorial news of the day, commonly called news reels, or

excerpts from the daily press, may be exhibited without inspection and no permits or fees shall be required therefor. (Amend. Coun. J. 12-21-39, p. 1396; 12-27-61, p. 6550.)

155-2. Before any such permit is granted, an application in writing shall be made therefor to the superintendent of police, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures are shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the superintendent of police, who shall inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected by the Film Review Section herein provided for, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted it shall be in writing and in such form as the superintendent of police may prescribe.

A Film Review Section of not less than six members shall be appointed under the supervision of the superintendent of police whose duty it shall be to review in the entirety all motion pictures sought to be exhibited in the City of Chicago. At least three members of the Section shall review each motion picture submitted and shall recommend in writing to the superintendent of police whether to grant or deny a permit. (Amend. Coun. J. 12-27-61, p. 6550.)

155-3. The fee for the original permit in each case shall be three dollars for each one thousand lineal feet of film or fraction thereof, and for each duplicate or print thereof an additional fee of one dollar for each one thousand lineal feet of film or fraction thereof, which fee shall be paid to the city collector before any permit is issued. (Amend. Coun. J. 12-27-61, p. 6550.)

155-4. Such permit shall be granted only after the motion-picture film for which said permit is requested has been produced at the office of the superintendent of police for examination.

If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made,

is obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the superintendent of police to refuse such permit; otherwise it shall be his duty to grant such permit. (Amend. Coun. J. 12-27-61, p. 6550.)

155-5. In addition to prohibiting the exhibition of motion pictures for obscenity or other reasons hereinabove stated in Section 155-4, it shall be the duty of the superintendent of police to prohibit the exhibition of motion pictures to children if the picture, considered as a whole, has the dominant effect of substantially arousing sexual desires in any person less than seventeen years of age, or if the picture is indecent, or is contrary to contemporary community standards in the description or representation of nudity or sex. The term "children" means any person less that seventeen years of age.

If the Film Review Section finds that a picture is unfit for children, a special permit shall be granted limiting the exhibition of such picture to persons over the age of 16 years. Procedural steps to be taken by the Film Review Section and the superintendent of police as well as the right of the applicant to appeal shall be taken as herein provided.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to knowingly allow any persons under the age of 17 years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown. (Amend. Coun. J. 12-27-61, p. 6550.)

155-6. The written permit provided for in this chapter shall be posted at or near the entrance of the theatre, hall, room, or place where any permitted picture or series of pictures is being exhibited, at such a place and in such a position that it may easily be read by any person entering such theater, hall, room, or place at any time when

any such permitted picture or series of pictures is being exhibited whether in the day time or in the night time. (Amend. Coun. J. 12-27-61, p. 6550.)

155-7. When a permit to show a picture or series of pictures is once granted to an exhibitor, the picture or series of pictures may be shown by any other exhibitor; provided, that the written permit is actually delivered to such other exhibitor and that a written notice of the transfer or lease to such other exhibitor is first duly mailed by the transferee or lessee to the superintendent of police. Any number of transfers or leases of the same picture or series of pictures may be made, provided always that the permit is actually delivered to the transferee or lessee and that such written notice be first mailed to the superintendent of police.

Said written notice shall contain the name and a brief description of the picture or series of pictures, the number of the permit and the location of the building or place where the transferee or lessee proposes to exhibit such picture or series of pictures. The exhibition by any transferee or lessee of any permitted picture or series of pictures without first mailing such notice shall be considered a violation of this chapter, and a separate offense shall be regarded as having been committed for each day's exhibition by a transferee or lessee of each picture or series of pictures without the mailing of such notice.

In case a permit shall be refused for any such motion-picture plates, films, rolls, or other like articles or apparatus from which a series of pictures for public exhibition can be produced, it shall be unlawful for any person to lease or transfer the same to any exhibitor of motion pictures or otherwise put the same into circulation for purposes of exhibition within the city. (Amend. Coun. J. 12-27-61, p. 6550.)

155-7.1. There is hereby created a Motion Picture Appeal Board as part of the Executive Department of the City of Chicago, which Board shall consist of at least five members to be appointed by the Mayor. Said members shall be persons experienced or educated in one or

more of the following fields: art, drama, literature, philosophy, sociology, psychology, history, music, science or other related fields. Said members shall be compensated in the amount of $50 for each attendance at the meeting of the Board for the purpose of reviewing motion pictures for which a permit has been denied and a review requested by the owner, agent or exhibitor of said motion picture.

Within seven days after rejection by the Superintendent of Police, the applicant may file a written request with the Motion Picture Appeal Board for review of the decision of the Superintendent. The film shall be made available to the Board for examination at such place as the Board may designate in writing. The Board shall review the picture in its entirety within fifteen days of receipt of said request for review. Within fifteen days after reviewing the picture and before any determination is made by the Board, the exhibitor, his agent or distributor seeking the permit on review shall be given an opportunity to present testimony and statements or arguments in support of the exhibition of said film. Within five days after the hearing, the Board shall serve written notice of its ruling upon the applicant, in person or by registered or certified mail. Any ruling affirming the decision of the Superintendent of Police in rejecting a motion picture shall be signed by at least three members of the Board. (Amend. Coun. J. 3-24-65, p. 4403.)

155-7.2. In the event the Motion Picture Appeal Board affirms the decision of the Superintendent of Police in rejecting a motion picture, the Board, within ten days from the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film. (Amend. Coun. J. 3-24-65, p. 4403.)

155-7.3. REPEALED. (Coun. J. 3-24-65, p. 4403.)

155-7.4. If any part, section, sentence, or clause of this ordinance shall be adjudged void and of no effect, such decision shall not affect the validity of the remaining portion of this ordinance. (Added. Coun. J. 12-27-61, p. 6550.)

APPENDIX B.

AMENDMENT TO SECTION 155-2 OF THE CHICAGO ORDINANCE.

(This amendment to the ordinance was passed on April 21, 1967, while these cases were pending before the Supreme Court of Illinois.)

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION 1. Sections 155-2 and 155-5 of Chapter 155 of the Municipal Code of Chicago are amended as follows:

155-2. Before any such permit is granted, an application in writing shall be made therefor to the superintendent of police, and the plates, films, rolls, or other like apparatus by or from which such picture or series of pictures itself as shown or produced, or the picture or series of pictures itself as shown or exhibited, shall be shown to the superintendent of police, who shall within three days of receipt inspect such plates, films, rolls, or apparatus, or such picture or series of pictures, or cause them to be inspected within three days of receipt by the Film Review Section herein provided for, and within three days after such inspection he shall either grant or deny the permit. In case a permit is granted it shall be in writing and in such form as the superintendent of police may prescribe.

A Film Review Section of not less than six members shall be appointed under the supervision of the superintendent of police whose duty it shall be to review in the entirety all motion pictures sought to be exhibited in the City of Chicago. At least three members of the Section shall review each motion picture submitted and shall recommend in writing to the superintendent of police whether to grant or deny a permit.

155-5. It shall be the duty of the superintendent of police to prohibit the exhibition of motion pictures to children if the picture, considered as a whole, is obscene when viewed by children. The term "children" means any person less than eighteen years of age.

If the Film Review Section finds that a picture is obscene when viewed by children, a special permit shall be granted limiting the exhibition of such picture to persons 18 years of age and older. Procedural steps to be taken by the Film Review Section and the superintendent of police as well as the right of the applicant to appeal shall be taken as herein provided.

When such special permit has been issued, it shall be unlawful for any person exhibiting said picture to knowingly allow any persons under the age of 18 years to enter the place where same is being exhibited or to remain in said place while any part of said picture or series of pictures is being shown.

SECTION 2. Chapter 155 of the Municipal Code of Chicago is amended by adding Section 155-7.3 as follows:

155-7.3. In the event the Motion Picture Appeal Board affirms the decision of the superintendent of police in awarding a special permit in accordance with Section 155-5, the Motion Picture Appeal Board within five days after the hearing shall serve specific written reasons for its ruling upon the applicant, in person or by registered or certified mail. The applicant, if it chooses, shall within five days of receipt of the aforementioned written reasons serve written notice by registered or certified mail upon the Motion Picture Appeal Board of its unwillingness to accept the special permit. Within 10 days of receiving written notice from the applicant of unwillingness to accept the special permit, the Motion Picture Appeal Board shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film to persons under the age of 18 years.

SECTION 3. This Ordinance shall be in force and effect from and after its passage and due publication.

APPENDIX C.

MEMORANDUM OPINION OF THE CIRCUIT COURT IN 66 CH 748

This cause coming on to be heard on the motion filed herein by the defendants to strike and dismiss the amended complaint herein; and

The Court having considered said motion and the amended complaint of the plaintiffs heretofore filed herein and having viewed the defendant film, "Rent-a-Girl," hereinafter referred to as "the film" (Exhibit "'A" of the Complaint); and

The Court having heard arguments and statements of counsel and being fully advised in the premises,

The Court makes the following findings of fact and conclusions of law:

(1) The film deals with the story of a business firm which rents out young girls to satisfy nefarious sexual perversions of its clientele. The episodes contained in this film are portrayed in a detailed and sensational manner which appeals to the prurient interest, that is a morbid and shameful interest in nudity and sex. The film purports to be a documentary, but in fact the narration is merely a device and vehicle for the portrayal of connected scenes of sex and nudity in a prurient fashion.

(2) The film is obscene within the meaning of Chapter 155 of the Municipal Code of Chicago and the decisions of the United States Supreme Court in that:

(a) To the average person, applying contemporary community standards, both national and local, the dominant theme of the film taken as a whole appeals to prurient interest, that is to a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

(b) The film is utterly without redeeming social, artistic, literary or scientific importance.

(c) The film is patently offensive, that is, it affronts current community standards of decency.

(d) When considered as a whole, the calculated purpose of the film is substantially to arouse sexual desires in the normal, average person.

(3) Chapter 155 of the Municipal Code of the City of Chicago is constitutional in that:

(a) The burden of taking court action to enjoin a film as obscene is upon the Motion Picture Appeal Board of the City of Chicago.

(b) The licensing and review procedures outlined in Chapter 155 afford the applicant Due Process.

It Is The Conclusion Of The Court, the said motion of defendants to strike and dismiss the amended complaint is without merit, and the same is hereby denied.

It Is Therefore The Judgment Of The Court That the following injunctive order, in addition to the foregoing findings, be incorporated in a decree.

The defendant film entitled "Rent-A-Girl" be permanently enjoined from being exhibited in the City of Chicago in any public place, or in a place where the public is admitted, including but not limited to both indoor and outdoor motion picture theaters; that

The defendants Teitel Film Corporation, a corporation, and Charles Teitel, be permanently enjoined from showing or exhibiting the film entitled "Rent-A-Girl" in the City of Chicago in a public place, or in a place where the public is admitted, including but not limited to indoor and outdoor motion picture theaters.

Counsel will prepare a decree consistent with this memorandum.

/s/ Cornelius J. Harrington
Judge

APPENDIX D.

MEMORANDUM OPINION OF THE CIRCUIT COURT IN 66 CH 1411

This cause coming on to be heard on the motion filed herein by defendants to strike and dismiss the amended complaint herein; and

The Court having considered said motion and the amended complaint of the plaintiffs heretofore filed herein and having viewed the defendant film "BODY OF A FEMALE," hereinafter referred to as "the film" (Exhibit "A" of the Amended Complaint); and

The Court having heard arguments and statements of counsel and being fully advised in the premises,

The Court makes the following findings of facts and conclusions of law:

(1) The film deals with story of a pervert who achieves sexual satisfaction by beating nude girls. The episodes contained in this film are portrayed in a detailed and sensational manner which appeals to the prurient interest, that is a morbid and shameful interest in nudity and sex. The film purports to tell a story, but in fact the narration is merely a device and vehicle for the portrayal of connected scenes of sadism, sex and nudity in a prurient faction.

(2) The film is obscene within the meaning of Chapter 155 of the Municipal Code of Chicago and the decisions of the United States Supreme Court in that:

(a) To the average person, applying contemporary community standards, both national and local, the dominant theme of the film taken as a whole appeals to prurient interest, that is, to a shameful or morbid interest in nudity and sex, which interest goes substantially beyond customary limits of candor in description or representation of such matters.

(b) The film is utterly without redeeming social, artistic, literary, scientific or other such similar importance.

(c) The film is patently offensive, that is, it affronts current community standards of decency.

(d) When considered as a whole, the calculated purpose of the film is substantially to arouse sexual desires in the normal, average person.

(3) Chapter 155 of the Municipal Code of the City of Chicago is constitutional in that:

(a) The burden of taking court action to enjoin a film as obscene is upon the Motion Picture Appeal Board of the City of Chicago.

(b) The licensing and review procedures outlined in Chapter 155 afford the applicant Due Process.

It Is The Conclusion Of The Court, the said motion of defendants to strike and dismiss the amended complaint is without merit and the same be and is hereby denied.

It Is Therefore The Judgment Of The Court That the following injunctive order, in addition to the foregoing findings, be incorporated in a decree:

The defendant film entitled "BODY OF A FEMALE" be permanently enjoined from being exhibited in the City of Chicago in any public place, or in a place where the public is admitted, including but not limited to both indoor and outdoor motion picture theaters; that

The defendants Teitel Film Corporation, a corporation, and Charles Teitel, be permanently enjoined from showing or exhibiting the film entitled "BODY OF A FEMALE" in the City of Chicago in a public place, or in a place where the public is admitted, including, but not limited to indoor and outdoor motion picture theaters.

Counsel will prepare a decree consistent with this memorandum.

/s/ Cornelius J. Harrington
Judge

APPENDIX B.

OPINION OF THE ILLINOIS SUPREME COURT

Mr. Chief Justice Solfisburg delivered the opinion of the court:

The defendants, Teitel Film Corporation and Charles Teitel, appeal directly to this court from orders of the circuit court of Cook County permanently enjoining the defendants from showing certain motion pictures in public places in the city of Chicago. The injunction orders were issued as a result of separate proceedings brought by the members of the Motion Picture Appeal Board of Chicago to enjoin defendants from exhibiting a film entitled "Rent-A-Girl" and another entitled "Body of a Female." Since the defendants seek review of the rulings regarding each film on identical grounds, we have consolidated the cases for review.

Defendants contend that (1) the Chicago ordinance under which these proceedings were instituted and the actions of the Motion Picture Appeal Board are unconstitutional and violate the provisions for freedom of expression, due process, and protection against unreasonable searches and seizures under the United States and Illinois constitutions; (2) the films in question are not obscene; (3) the trial court erred in ruling on certain objections of the defendants relating to the pleadings and in denying defendants' motion to strike and dismiss the amended complaints.

Case No. 40215 relates to the film entitled "Body of a Female." On September 2, 1965, the defendants submitted this film to the Film Review Section of the Chicago Police Department for screening in accordance with the provisions of the Chicago Motion Picture Ordinance. On that same date the film was reviewed and rejected. Five months later, on February 9, 1966, the defendants applied to the Chicago Motion Picture Appeal Board for a re-

view of this ruling. The appeal board viewed the film on February 28, 1966, and a hearing was held on March 7, 1966, resulting in a decision to uphold the determination of the Chicago Police Department rejecting the film "Body of a Female" for licensing. Notice of this decision was mailed to the defendants on March 7, and on March 11, 1966, the board filed a complaint in the circuit court of Cook County seeking a permanent injunction against the exhibition of this film in public.

Case No. 40214 deals with film entitled "Rent-A-Girl." This film was submitted to the Chicago Police Department for review on December 3, 1965, and was subsequently screened and rejected on December 6, 1965. Defendant was notified of this rejection on December 6 and applied for review to the Motion Picture Appeal Board on January 5, 1966. The board screened the film on January 24 and a hearing was held on January 31 resulting in the decision to uphold the police department's rejection of the film. Notice of this action was mailed to the defendants on February 1, 1966, and a complaint seeking a permanent injunction against the exhibition of "Rent-A-Girl" was filed by the board on February 9, 1966.

Defendants filed motions to strike and dismiss in both cases and in each instance the motion was granted with leave given to the plaintiffs to file amended complaints. Amended complaints seeking injunctions against the showing of both pictures were subsequently filed on May 20, 1966, and again defendants filed motions to strike and dismiss. The films were subsequently reviewed by the court and a hearing on defendants' motion to strike was held on June 22, 1966. Thereafter the trial court filed memorandum opinions in both cases No. 40215 and No. 40214 on August 3, 1966, finding the films to be obscene and denying defendants' motions. On August 8, 1966, the injunction orders appealed from were entered.

The defendants initially contend that the Chicago Motion Picture Ordinance is violative of the due-process and free-expression provisions of the United States and Illinois constitutions.

The ordinance in question, chapter 155 of the Municipal Code of the city of Chicago, sets forth licensing procedures for motion pictures for exhibition in the city of Chicago. The ordinance was originally enacted in 1939 and was amended in 1961 by the creation of the Motion Picture Appeal Board. It was again amended in 1967 after the proceedings involved in the present cases took place.

The ordinance provides, in effect, that before a motion picture may be shown in the city of Chicago, the film along with a written application for exhibition permit must be submitted to the superintendent of police. Section 155—2 of the ordinance provides that either the superintendent or the Film Review Section, acting under the superintendent, shall inspect the film and either grant or deny an exhibition permit within three days after such inspection.

Section 155—7.1 of the ordinance creates the Motion Picture Appeal Board and provides that "within seven days after rejection by the Superintendent of Police, the applicant may file a written request with the Motion Picture Appeal Board for review of the decision of the Superintendent." The section goes on to provide that the film in question shall be made available to the board for examination, which examination must take place within 15 days of the request for review. Within 15 days after reviewing the picture and before any determination is made by the board, the applicant for the permit shall be given a hearing at which time he may present testimony or arguments in support of the exhibition of the film. The board then has five days after the hearing in which to serve written notice of its ruling upon the applicant.

Section 155—7.2 provides that if the Motion Picture Appeal Board affirms the decision of the superintendent of police in rejecting the application, the board must, within 10 days after the hearing, file an action for an injunction against the showing of the film with the circuit court of Cook County. It should here be noted that general order No. 3—3 of the circuit court of Cook

County provides that a hearing on a complaint for an injunction pursuant to chapter 155 must be held within 5 days after the filing of an answer, or if the complaint is not answered, within 5 days after the last day allowed for the filing of an answer.

The defendants initially contest the validity of the entire proceedings on the ground that the Chicago Motion Picture Ordinance under which they were instituted does not provide sufficient procedural safeguards to protect the defendants' constitutional rights of due process. Before discussing the sufficiency of these safeguards, however, we must first determine whether, as defendants contend, the ordinance is invalid on its face as being a prior restraint upon freedom of expression as guaranteed by the Illinois constitution.

Although defendants do not contest the holding of the United States Supreme Court that obscenity is not protected expression under the first and fourteenth amendments to the United States constitution (*Roth* v. *United States,* 354 U.S. 476, 1 L. Ed. 2d 1498), they argue that all motion pictures are protected under section 4 of article II of the Illinois constitution, which provides that, "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty * * *." This section of the Illinois constitution was discussed by this court in *Montgomery Ward & Co.* v. *United Retail, Wholesale & Dept. Store Employees,* 400 Ill. 38, in connection with the application for an injunction to stop malicious libel. It was there observed that the free-expression provision in the Illinois constitution was broader than that of the constitution of the United States. Relying on *Montgomery Ward* the defendants urge that the Illinois constitution allows a "broader" and therefore more permissive approach to obscenity than does the United States constitution. We do not agree. The holding in *Montgomery Ward* dealt solely with the validity of the remedy of injunctions in libel cases and has no bearing upon the question of whether obscenity is protected expression under section 4 of article II and therefore free from prior restraints.

Lest any further confusion reign in this area, however, we herewith specifically adopt the reasoning set down by the United States Supreme Court in *Roth* and hold that the language of section 4 of article II of the Illinois constitution does not extend to a protection of obscenity. In *Times Film Corp.* v. *City of Chicago,* 365 U.S. 43, 5 L.Ed. 2d 403, the United States Supreme Court held that the Chicago Motion Picture Ordinance, by requiring the submission of all motion pictures to a censor prior to exhibition did not, upon its face, necessarily violate the freedom of speech guaranteed by the first and fourteenth amendments to the Federal constitution. We hold that such a prerequisite likewise does not necessarily violate any constitutional guarantees of the Illinois constitution.

We do not mean to imply, however, that prior restraints on the exhibition of motion pictures are constitutional under all circumstances. Indeed, as was pointed out in *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, page 70, 9 L. Ed. 584, at 593: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." When this validity is challenged, as here, "The judicial angle of vision * * * is 'the operation and effect of the statute in substance'." *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L. Ed. 2d 1469, 1474.

Our "angle of vision" is not without guidelines. The United States Supreme Court was called upon to examine the constitutionality of a motion picture statute containing prior restraints in *Freedman* v. *Maryland,* 380 U.S. 51, 13 L. Ed. 2d 649. There the court, although upholding the ruling in *Times Films* that a prior restraint is not necessarily unconstitutional, stated at pp. 58-59: "Applying the settled rule of our cases, we hold that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. First, the burden of proving that the film is unprotected expression

must rest on the censor. * * * Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. * * * To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. * * * Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."

After enunciating these guidelines the court in *Freedman* stressed that, while it was up to the local authorities to incorporate these procedural safeguards in the censorship ordinances, it was not attempting to lay down rigid time limits or procedures. It is defendants' contention, however, that these safeguards have not been incorporated into the Chicago ordinance. They first argue that the ordinance violates the *Freedman* rules by placing the burden upon the exhibitor to appeal from an adverse determination by the superintendent of police. Section 155—7.1 of the ordinance provides that after a film has been rejected by the superintendent of police, the applicant has 7 days to request review by the Motion Picture

Appeal Board. This section, rather than placing a burden upon the exhibitor, affords him a remedy and opportunity for review within the administrative proceedings. Such a section can hardly result in a deprivation of a defendant's constitutional rights and to argue otherwise is to misconstrue the holding in *Freedman*. The evil there sought to be corrected by the establishment of the first safeguard was the requirement in the Maryland ordinance that once a censor disapproved a film, the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression was upon the exhibitor. No such requirement is contained in the Chicago ordinance. In fact, section 155—7.2 specifically provides that the Motion Picture Appeal Board must commence legal proceedings if an injunction is required. We conclude, therefore, that the procedures established by the Chicago ordinance do not violate the first safeguard established by *Freedman*.

The defendants next charge that the ordinance violates *Freedman* by providing no safeguards against unreasonable delay both in the administrative proceedings and in obtaining a judicial determination on the issue of obscenity. As far as the administrative proceedings are concerned, the ordinance itself sets forth a schedule of 50 days for the total administrative reviewing of the film—from the time of inspection by the superintendent of police or Film Review Section to the filing of a suit for injunction by the board in the circuit court. It appears from the record, however, that 68 days elapsed in case No. 40214 and 190 days in case No. 40215, and both plaintiffs and defendants allow substantial space in their briefs to attributing the delay to the other side.

Insofar as a judicial determination by the circuit court is concerned, the record shows that the elapsed time between the submission of case No. 40214 ("Rent-A-Girl") to the superintendent of police and the order of the trial court permanently enjoining the film from being shown was approximately 9 months. The elapsed time in the proceedings relating to case No. 40215 ("Body of a

Female") was approximately 11 months. Again, each side charges the other with causing the delay.

After careful consideration, however, we find it unnecessary to resolve the question of whether plaintiffs or the defendants caused all of the delay. We look rather to the ordinance itself, in the light of *Freedman* and subsequent cases, and conclude that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants.

This decision is based upon our feeling that, contrary to the defendants' interpretation of *Freedman,* it is impossible to measure constitutional rights in terms of days, particularly where, as here, the defendants contributed substantially to the delay. The defendants, in seeking to prove that the administration of the ordinance in question results in delays, or at least is time-consuming, cite several cases in which censorship statutes have been struck down. In each of these cases, however, the facts are substantially different from those before us. In *Embassy Pictures Corp.* v. *Hudson,* 242 F. Supp. 795, the Memphis ordinance contained, as did the Maryland statute in *Freedman,* a requirement that the applicant must initiate judicial procedure from the board's action. We have previously noted that no such requirement is contained in the Chicago ordinance. The ordinance in *Cambist Films, Inc.* v. *Board of Regents,* 260 N.Y.S.2d 804, was struck down because there was no guarantee that the Board of Regents would take prompt judicial action after refusing to license a film. Section 155—7.2 of the Chicago ordinance, as we have noted, provides that the board has 10 days after its hearing to initiate legal proceedings.

In addition to the above cases the defendants place great reliance on *Interstate Circuit, Inc.* v. *City of Dallas,* (5th cir.) 247 F. Supp. 906, wherein the court struck down a censorship ordinance providing that the board's order classifying the suitability of films for young people would be suspended unless an injunction was issued

within 15 days after the filing of a notice of nonacceptance of the order by exhibitor. Although there were other defects found in the statute, the court specifically held that the aforementioned provision was so vague and indefinite as to make the exhibitor's right to a speedy determination of the issue uncertain, thus depriving him of due process of law. As the plaintiffs note, however, the ordinance in the *Interstate Circuit* case was amended after it had been stricken and, as amended, was upheld by the Court of Appeals in *Interstate Circuit, Inc.* v. *City of Dallas,* (5th cir.) 366 Fed. 2d 590. The amended statute, approved on appeal, did nothing to make the provision in question any more specific, but rather provided that the board must seek an injunction within 3 days and apply for a hearing on the injunction within 5 days. The ordinance went on to provide that if the injunction is allowed and the exhibitor appeals, the censor must waive all statutory notices and file its reply to the exhibitor's brief within 5 days.

Although the Chicago ordinance, at the time of the proceedings herein, did not specifically require immediate viewing of the submitted film by the police superintendent, we find this to be relatively unimportant since, as pointed out earlier in this opinion, "Rent-A-Girl" (case No. 40214) was submitted on Friday, December 3, 1965, and screened and rejected on Monday, December 6, 1965; "Body of a Female" (case No. 40215) was both submitted, screened and rejected on September 2, 1965. We further point out that section 155—2 of the ordinance was amended by the Chicago city council on April 21, 1967. This amendment, admittedly having little effect on the proceedings involving the defendants, provides that the police superintendent or the Film Review Section must inspect films submitted to them within 3 days of their receipt. Notwithstanding, then, the absence of this requirement at the time these proceedings were initiated, we are of the opinion that the time limits provided by the ordinance are such as are reasonably necessary to insure an intelligent and careful consideration, by both the Film Review Section and the appeal board of the

material in question. The restraint contemplated by the ordinance is to assure a submitted film of obtaining careful consideration in the light of contemporary community standards relating to obscenity. Moreover, although we recognize that delay may result from failure to follow the procedures set out by the ordinance, we found nothing in the ordinance itself which would preclude a reasonably prompt judicial determination of whether a particular film is constitutionally protected. In fact general order No. 3—3 of the circuit court of Cook County, cited earlier in this opinion, specifically provides that a hearing shall be held within 5 days after the defendant answers the plaintiff's complaint, or if the defendant does not answer within 5 days after the last day allowed for the filing of an answer. We conclude that the ordinance, together with the general order, provides sufficient safeguards to assure an exhibitor of a prompt judicial hearing within the meaning of *Freedman* and thus, protects his rights to due process, and free expression.

The defendants further contend that the appeal board has unlawfully confiscated the films in question, thereby denying the defendants of due process. We dispose of this argument by pointing out that no confiscation or seizure actually took place. The films were submitted by the defendants to the Film Review Section and again submitted to the appeal board when defendants sought review of the decision to reject the films. Consequently, defendants can hardly argue that the retention of the films by the board during the screening and subsequent hearing constitutes illegal seizure. Furthermore, the defendants themselves objected to the original complaints filed by the board with the circuit court on the grounds that the films were not attached and made a part thereof. Plaintiffs subsequently amended their complaints and attached the films, thus making them part of the record. As such, it lies within the discretion of the judge to determine when the films may be returned to the defendants. Since we found it necessary to view the films in considering defendants' contentions on appeal, we con-

clude that neither the trial judge nor any other court official has denied defendants due process by withholding the films while they are still involved in this litigation. We therefore conclude that the Chicago Motion Picture Ordinance is valid.

We now must consider the defendants' contention that the films are not obscene. The plaintiffs argue that this contention has been improperly asserted at this time. After the trial court filed its memorandum opinions denying the defendants' motion to strike and dismiss the amended complaints, the defendants elected to stand on their motions rather than file answers to the amended complaints. It is plaintiffs' position that this election prevents defendants from now raising the question of obscenity since their "motion to strike and dismiss the amended complaints admitted that the films 'Rent-A-Girl' and 'Body of a Female' were obscene." While it is true that a motion to strike a complaint admits the facts contained therein, this admission does not extend to conclusions of law. (*Pierce* v. *Carpentier,* 20 Ill.2d 526.) Although we find that the amended complaints, together with the copies of the films attached thereto, allege sufficient facts tending to prove that the films are obscene, the assertion that they are, in fact, obscene constitutes a legal conclusion drawn by the plaintiffs and consequently we hold that the issue of obscenity has not been admitted by the defendants' motions to strike and subsequent election to stand on their motions.

We turn now to the contention that the trial court used improper standards in determining the films to be obscene. The trial judge, after having viewed the films and listened to oral arguments, found the movies to be obscene and denied defendants' motions to strike the amended complaints and further ordered the exhibitions of the films to be permanently enjoined. Both in the memorandum opinions and in the orders, the trial judge found that each film was obscene within the meaning of section 155 of the Municipal Code of Chicago and the decisions of the United States Supreme Court in that, (a) to the average person,

applying contemporary community standards, both national and local, the dominant theme of the films taken as a whole appeals to the prurient interest, that is, a shameful or morbid interest in nudity, and sex, which interest goes substantially beyond the customary limits of candor in description or representation of such matters; (b) the films are utterly without redeeming social, artistic, literary, scientific or other such similar importance; (c) the films are patently offensive, that is, they affront current community standards of decency; (d) when considered as a whole, the calculated purpose of the films is substantially to arouse sexual drives in the normal average person.

The defendants admit that the trial court included the proper standards for determining obscenity in its list of reasons, but asserts that improper standards were also listed, and consequently "there is no way of telling whether the proper standards were actually applied or whether they were merely set out in an attempt to give lip service to them."

The prurient interest standard used by the trial judge was established by the United States Supreme Court in *Roth* v. *United States,* 354 U.S. 476, 1 L. Ed. 2d 1498. The defendants do not object to this standard as a test for determining obscenity, but object to the manner of its application. The court in *Roth* did not indicate whether the "contemporary community standards" to be applied were to be those of a national or a local standard. In subsequent cases the Supreme Court was confronted by this problem and in both *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478, 8 L. Ed. 2d 639, and in *Jacobellis* v. *Ohio,* 378 U.S. 184, 12 L. Ed. 2d 793, several Justices thought the applicable standard to be national rather than local. As this court pointed out in *People* v. *Sikora,* 32 Ill.2d 260, 264, however, the United States Supreme Court has been unable to reach a majority view as to which standard should be applied. Both in *Sikora* and in *City of Chicago* v. *Universal Publishing and Distributing Corp.,* 34 Ill.2d 250, we found it unnecessary to determine this issue. In view of the fact that the trial judge here appraised the

films in terms of both national and local community standards, we again find no reason to decide the question.

The second standard used by the trial judge is also derived from *Roth* wherein the court stressed that obscenity has no redeeming social importance.

The prurient interest standard of *Roth* was expanded in *Manual Enterprises* v. *Day*, where the court added the patent offensiveness test in determining whether material was obscene under 18 U.S.C.A. sec. 1461, which bars obscene material from the mails. In view of *Manual Enterprises*, therefore, we hold that the third standard used by the trial judge was also appropriately applied in determining whether the films were obscene.

The standard to which the defendants most strenuously object is the fourth and last one to be found in the memorandum opinions of the trial judge, to-wit: "When considered as a whole, the calculated purpose of the film[s] [are] substantially to arouse sexual desires in the normal, average person." The defendants contend that this criterion has no sanction in law as a standard and is completely irrelevant to this inquiry. On the basis of recent decisions in the United States Supreme Court we agree with the defendants that this standard, taken alone, would not be a sufficient basis for determining a particular film to be obscene. The mere fact that material is calculated to arouse the sexual desire of a normal, average person does not necessarily render that material patently offensive, nor does it automatically bring it within the range of that material appealing to the prurient interest. Although the portrayal of sexual activities could reasonably tend to arouse sexual desires in an average person, this in and of itself does not render the portrayal obscene and, as pointed out in *Roth*, "sex and obscenity are not synonymous." As defined in *Roth*, "prurient interest" is a shameful and morbid interest in nudity, sex or excretion. Furthermore, the *Roth* standard requires a finding that the material "goes substantially beyond customary limits of candor in description or representation of such matters." The plethora of opinions attempting to adequately

and definitively determine what material is and what is not obscene vividly illustrates the difficulties encountered in this area.

We do not find that the inclusion of this standard voids the finding that the films are obscene. Here the court specifically used the prurient-interest and patent-offensiveness standards in reaching its decision. Since, as we have pointed out, these guidelines have been approved, we hold that the consideration of additional, unapproved, guidelines does not deprive the defendants of any constitutional protection.

The defendants further contend that the rulings of the trial court were improper because the board did not offer or present any evidence to support its own findings other than the films themselves. We note, however, that the defendants offered no evidence relating to contemporary community standards, either on a local or national level, and in the absence of such evidence, the triers of fact are the exclusive judges of what the common conscience of the community is. (*Roth* v. *United States*, 354 U.S. 476; *City of Chicago* v. *Kimmel*, 31 Ill.2d 202). In the absence of any other evidence, therefore, we hold that it was proper for the trial court to base its opinion upon the films, taking into consideration the constitutionally approved standards for determining whether they were or were not obscene.

Defendants also point out that they offered to edit the films to conform to the board's standard, but that this offer was ignored. *Roth* v. *United States*, 354 U.S. 476, at page 489, established, however, that a film must be taken as a whole in considering whether or not it is obscene. The amended complaint alleged, and the opinion of the trial court found, that the dominant theme of the films taken as a whole, appeals to the prurient interest. Consequently defendants' offer to amend particular scenes would have little or no effect upon its impact as a whole.

Having ruled that the majority of the standards used by the trial court in reaching its decision have been approved by the United States Supreme Court, the nature of the

issues involved necessitates a determination by us as to whether these films are obscene. Resolution of this issue requires an independent constitutional judgment by us as to whether these films fall within or beyond the constitutional guarantees of freedom of speech incorporated in the first amendment to the United States constitution and section 4 of article 2 of the Illinois constitution. *Jacobellis* v. *Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793; *City of Chicago* v. *Kimmel*, 31 Ill.2d 202.

"Rent-A-Girl", the film sought to be enjoined in case No. 40214, is described by the defendants as a documentary. The opening scene of this film shows a rather distraught but attractive young woman sitting in what is apparently the office of a District Attorney. We learn that she has recently undergone a frightening experience in associating with a brother and sister team that specializes in providing young women to satisfy the perverted needs of sexual deviates, and has decided to cooperate with the authorities in order to "stop this sort of thing." The District Attorney then asks here to relate her experience and through a series of flashbacks, the audience views, in scene after scene, episodes involving lesbianism, flagellation, sadism, voyeurism and group orgies, as well as the more conventional, if less imaginative, heterosexual activities. The heroine realizes the error of her ways in the final scenes of the movie when she attends an orgy where she is forced to partially disrobe before the assemblage and allow herself to be marked with a hot branding iron on her thigh. Seeking relief from the pain she manages to crawl into a bathroom where she discovers the mutilated corpse of a woman whom we have seen whipped to death a short time before.

Case No. 40215 involves the movie "Body of a Female." In this film a young man, hereafter referred to as "X", has been attracted to a woman he has seen performing in a strip tease show. Desiring to become better acquainted, he seeks a man we shall call "Y" to bring her to X's mansion in the country. Y then proceeds to kidnap the woman from her apartment while she is taking a bath and

drives to X's mansion where she is offered a sum of money if she will remain with X for a few days. Although she agrees to this, she is not aware that X is a sadist who derives his sexual pleasure from flagellating and otherwise maiming women. Y, however, learns of X's sadistic traits and returns to the mansion to rescue the young woman. Before Y can arrive on the scene, X manages to disrobe and whip his victim and just as he is about to replace the whip with a knife, Y breaks into the room and flees with the woman. The remainder of the film concerns X's attempts to find both Y and the woman in New York City. The search is interrupted occasionally by scenes in which X is taking photographic shots of different girls in various stages of undress. Another interruption occurs when he flogs a masseuse whom he has partially disrobed by force. When he finally manages to locate the couple, a fight ensues, X is left lying on a beach, and Y and the woman go off presumably to live happily ever after.

The defendants readily admit that the films in question deal with sex and they accuse the board and the trial court of confusing sex with obscenity. We believe the defendants are the ones who are confused. We certainly do not challenge the truth of the defendants' citation from *Roth* that "sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages [and] is one of the vital problems of human interest and public concern," and we presume from the use of this language that the defendants are indirectly claiming that, because their films deal with a "problem of human interest and public concern," they have "that redeeming social importance" which would render them constitutionally protected.

We are not impressed with this argument. Contrary to the defendants' assertion, our examination of these films shows that they deal not merely with sex, but with sexual deviations which can only appeal to those with a shameful and morbid interest in nudity and sex. The suggestive titles alone indicate the nature of the films and indeed the producers have apparently spared no effort to see that the spectator searching for the erotic is not disappointed.

Both films clearly go beyond the customary limits of candor in this country. The use of the District Attorney in "Rent-A-Girl" is a ludicrous attempt to make it appear as though the film is directed to a discussion of a social and legal problem. As such it fails. The film is nothing more than a vehicle for portraying one abnormal sexual episode after another. Although "Body of a Female" makes no such attempt to present an aura of respectability, its flagellation scenes can appeal only to the prurient interest. On the basis of *Roth* and subsequent Supreme Court cases, and having applied the standards established therein, we find both films to be obscene and therefore beyond the protection of either the first amendment to the United States constitution or section 4 of article II of the Illinois constitution.

We now turn to errors in procedure allegedly occurring in the lower court. The defendants first contend that the court erred in failing to require the joinder of necessary parties to these proceedings. Specifically, they contend that the owners of the films, the authors thereof, the holders of the copyright, the producers, and the regional and national distributors should have been made parties defendants, since their property interests were affected. As was pointed out in *Interstate Circuit, Inc.* v. *City of Dallas*, 366 F. 2d 590, however, the leading United States Supreme Court decision dealing with censorship ordinances, *Freedman* v. *Maryland*, 380 U.S. 51, 13 L. Ed. 2d 649, did not require that national distributors be joined in censorship proceedings if their interests were represented by others. Our own court has held that persons who are effectively represented need not be made parties. (*Cales* v. *Dressler*, 315 Ill. 142.) Although *Cales* dealt with the question of whether or not the executor could effectively represent the legatees under a will, the basic principle is applicable here. The named defendants, Teitel Film Corporation and Charles Teitel, are the Chicago representatives of the owners of these films. We note that in their correspondence to the motion picture board, made part of the record, the defendants assert that as representatives of the owners

they have the authority to amend the films in question. We believe that the interests of the named defendants are similar, if not identical, to that of the owners, authors and other proposed defendants, and that the working relationship between the two is such as to afford adequate protection for all. Consequently, we conclude no error was committed by the trial court in this regard.

Another contention raised by the defendants is that the joinder of the films themselves as parties defendant was error since section 24 of the Civil Practice Act (Ill. Rev. Stat., 1965, chap. 110, par. 24) provides only that "Any *person* may be made a defendant * * *." (Emphasis ours.) We find no need to determine, however, the issue of whether or not a film can be a "person" within the meaning of the Civil Practice Act. In view of the fact that the applicants were properly named and served as parties defendant as is provided for by the Chicago Motion Picture Ordinance, the fact that the films were also named as parties defendant is immaterial and resulted in no harm to the defendants' cause.

The defendants also urge that the plaintiffs were not the proper parties to bring this suit. They raise several points, principal among them being that the city of Chicago should have brought this action. Section 155—7.2 of the Chicago Motion Picture Ordinance provides: "In the event the Motion Picture Appeal Board affirms the decision of the Superintendent of Police in rejecting a motion picture, the Board, within ten (10) days after the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film." We have held that this ordinance provides the procedural safeguards delineated in *Freedman*, and we also hold that the appeal board in its official capacity as authorized by the ordinance is the proper party to initiate these proceedings. Defendants claim, however, that even if the board is authorized to bring this suit, it was error to name the board members individually. This argument, like several others in defendants' brief, is devoid of merit. Each board member is included by name and official capacity as

a member of the Motion Picture Appeal Board. We trust that the defendants were not confused by this procedure and hold that it is proper both under section 21 of the Civil Practice Act and the Chicago Motion Picture Ordinance.

A further contention of the defendants is that the trial court erred in denying their motion to strike and dismiss the amended complaints as they "contain no facts whatsoever to support the unlawful and improper issuance of injunctions against the showing of these films in the City of Chicago." Although we have held earlier in this opinion that the question of whether or not the films under consideration are actually obscene is one of law and that, consequently, the plaintiffs' assertions that they are obscene are merely legal conclusions, we do not agree with the defendants' position that the complaints were comprised in their entirely of conclusions of either law or fact. The subject films themselves were incorporated by reference in the amended complaints. These films, together with the characterizations of their contents and the United States Supreme Court guidelines as set down in the complaints, presented sufficient facts from which the trial court could determine the issue of obscenity and order the requested injunctions. We conclude, therefore, that the trial court did not abuse its discretion in denying defendants' motions to strike and dismiss.

Defendants finally urge that the trial court should have sustained their motions because of the plaintiffs' failure to include in their complaints the transcripts of the proceedings before the board, contending that such inclusion is required by the Administrative Review Act. The injunction proceedings, however, were brought pursuant to the Chicago Motion Picture Ordinance and were not of the type that fall within the rules governing administrative review. Consequently, it was not necessary to include the transcript of the proceedings of the board in the amended complaints.

In conclusion, we find that the provisions of the Chicago Motion Picture Ordinance, as it existed at the time these proceedings took place, were not violative of the Illinois or United States constitutions, the films "Rent-A-Girl" and "Body of a Female" are obscene under the guidelines approved by the United States Supreme Court, and the proper parties, plaintiffs and defendants, have been designated in the amended complaints. For these reasons we conclude that the trial court correctly denied the defendants' motions to strike and dismiss the amended complaints and furthermore, that it correctly found the films in question to be obscene.

Accordingly, we affirm the orders of the trial court enjoining the showing of these films in the City of Chicago.

Orders affirmed.

SUPREME COURT, U. S.

FILED

NOV 24 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 787

TEITEL FILM CORPORATION, A CORPORATION, AND CHARLES TEITEL,

Appellants,

vs.

JOHN F. CUSACK, NER LITTNER, MARY MUELLER, HENRY RAGO AND MATTHEW SCHOENBAUM, MEMBERS OF THE MOTION PICTURE APPEAL BOARD OF THE CITY OF CHICAGO,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM.

RAYMOND F. SIMON,
Corporation Counsel of the City of Chicago,

MARVIN E. ASPEN,
Assistant Corporation Counsel, Head of Appeals and Review Division,
Room 511, City Hall,
Chicago, Illinois 60602,
Attorneys for Appellees.

THE SUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

INDEX.

	PAGE
Motion to Dismiss or Affirm	1
Opinion Below	1
Statement of the Case	2
The Films	4
Administrative Proceedings	4
Trial Court Proceedings	7
Illinois Supreme Court Proceedings	8
Argument	10
I. Chapter 155 of the Municipal Code of the City of Chicago Is Constitutional	10
II. The Films Are Obscene	17
Conclusion	20
Appendix "A"—General Order 3-3 of the Circuit Court of Cook County	21

AUTHORITIES.

Illinois Supreme Court Record No. 40214, pp. 2, 3, 5-37, 57-58	4
Illinois Supreme Court Record No. 40215, pp. 2, 35-37, 57-58	4
Illinois Supreme Court Record No. 40124, pp. 2, 9, 13, 22, 25, 58	7
Illinois Supreme Court Record No. 40125, pp. 2, 9, 14, 23, 58	7
§ 22a New York Code of Criminal Procedure (1958)	13

Table of Cases.

Cusack v. Teitel Film Corporation, 38 Ill. 2d 53, 230 N. E. 2d 241 (Ill. 1967) 1, 6, 16, 17, 18

Freedman v. Maryland, 380 U. S. 51 (1964) 3, 4, 9, 10, 11, 12, 13, 14, 15

Interstate Circuit, Inc. v. City of Dallas, 366 F. 2d 590 (5th Cir. 1966) 12

Kingsley Books, Inc. v. Brown, 354 U. S. 436 (1957) ... 13

Times Film Corp. v. City of Chicago, 365 U. S. 43 (1960) 2, 3

United States v. One Carton Positive Motion Picture Film, 367 F. 2d 889 (2nd Cir. 1966) 11, 12

Zenith International Film Corp. v. City of Chicago, 365 U. S. 43 (1960) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 787.

TEITEL FILM CORPORATION, A CORPORATION, AND CHARLES TEITEL,

Appellants,

vs.

JOHN F. CUSACK, NER LITTNER, MARY MUELLER, HENRY RAGO AND MATTHEW SCHOENBAUM, MEMBERS OF THE MOTION PICTURE APPEAL BOARD OF THE CITY OF CHICAGO,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

MOTION TO DISMISS OR AFFIRM.

Appellees in the above-entitled case move to dismiss or affirm on the ground that the question presented is so unsubstantial as not to need further argument.

OPINION BELOW.

The opinion below is set forth in Appellants' Statement, Appendix E, p. 12a. It is reported as *Cusack* v. *Teitel Film Corporation,* 38 Ill. 2d 53, 230 N. E. 2d 241 (Ill. 1967).

STATEMENT OF THE CASE.

Chapter 155 of the Municipal Code of the City of Chicago sets forth licensing procedures for motion pictures for exhibition in the City of Chicago. Chapter 155 was enacted on December 21, 1939. The principle of prior restraint as set forth in the Chicago Ordinance was approved by this Court in *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43 (1960). Subsequent to *Times Film*, the Court of Appeals for the Seventh Circuit, in *Zenith International Film Corp.* v. *City of Chicago*, 291 F. 2d 785 (1961), suggested that additional procedural safeguards be added to the ordinance. These new procedures were incorporated in Chapter 155 with the creation of the Motion Picture Appeal Board on December 27, 1961.

The members of the Motion Picture Appeal Board at the time of submission of the films "Rent-A-Girl" and "Body of a Female" were the following individuals, who are the appellees herein:

Mr. John F. Cusack. Mr. Cusack is a distinguished Chicago attorney and a former actor.

Dr. Ner Littner. Dr. Littner is an internationally known child psychoanalyst.

Dr. Mary G. Mueller. Dr. Mueller was senior child psychologist for the Chicago Board of Education (Dr. Mueller died in October of 1966). Mrs. Norman H. Gerlach, President of the Chicago Drama Society, has taken Dr. Mueller's place on the Board.

Dr. Henry Rago. Dr. Rago is a professor of poetry at the University of Chicago and is the Editor of Poetry Magazine, a literary publication of international reputation.

Dr. Matthew H. Schoenbaum. Dr. Schoenbaum is Dean of the School of Social Work of Loyola University.

In *Freedman* v. *Maryland*, 380 U. S. 51 (1964), decided on March 1, 1965, this Court (a) reaffirmed its prior holding in the *Times Film* case that a governmental body may require "submission of motion pictures in advance of exhibition," (b) but added that this procedure of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." (p. 58.) This decision set forth the requisite procedural safeguards as follows:

> "First, the burden of proving that the film is unprotected expression must rest on the censor." (p. 58.)
>
> "Second, while the State may require advance submission of all films, in order to proceed effectively to bar all showings of unprotected films, the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination whether a film constitutes protected expression. The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint."
>
> • • • • •
>
> "Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (pp. 58-59.)

This Court concluded:

> "How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide." (pp. 6.)
>
> • • • • •
>
> "*We do not mean to lay down rigid time limits or procedures,* but to suggest considerations in drafting legislation to accord with local exhibition practices, and in doing so to avoid the potentially chilling effect of the Maryland statute on protected expression." (pp. 60-61.) (Emphasis added.)

In a prompt response to the *Freedman* decision, on March 24, 1965, the City Council of the City of Chicago amended the Chicago Motion Picture Ordinance, incorporating therein the *Freedman* procedural safeguard requisites. On May 26, 1965, the Circuit Court of Cook County, Illinois, in further compliance with *Freedman*, adopted General Order No. 3-3. A copy of General Order No. 3-3 is set forth as Appendix "A" to this motion.

The Films.

The two films which are the subject matter of this case are entitled "Rent-A-Girl" and "Body of a Female".

Administrative Procedures.

The following is a factual statement of the administrative timetable followed in regard to the subject films. This factual data is supported by the following record references: Illinois Supreme Court Record No. 40214, pp. 2, 3, 5-37, 57-58; Illinois Supreme Court Record No. 40215, pp. 2, 35-37, 57-58.

At the time of submission of the subject matter films, the Film Review Section of the Chicago Police Department screens all films immediately on receipt. Under the present ordinance (amended prior to the rendering of the Illinois Supreme Court Opinion), the Film Review Section must screen all films within three days of submission. (Appellants' Statement, Appendix B, p. 6a.) "Rent-A-Girl" was submitted on Friday, December 3, 1965 and screened the next working day, Monday, December 6, 1965. Appellants were notified of the disapproval of the Superintendent of Police on that same date, December 6, 1965. (Illinois Supreme Court Record 40214, p. 57.) "Body of a Female" was submitted and screened on September 2, 1965. Appellants were notified of disapproval that same date. (Illinois Supreme Court Record 40215, p. 57.)

The Chicago Ordinance requires that the applicant, if he wishes, may within seven days of rejection request in writing that the Motion Picture Appeal Board review the film.

Appellants are the applicants for licenses to show the subject films. They did not request that the Motion Picture Appeal Board review "Rent-A-Girl" until January 5, 1966. Thus 23 days' delay is directly attributable to appellants (who were permitted to submit the film to the Motion Picture Appeal Board even though the seven day period was not complied with by them). Appellants did not request that the Motion Picture Appeal Board review "Body of a Female" until February 9, 1966. Thus, 153 days' delay is directly attributable to appellants (who were permitted to submit the film to the Motion Picture Appeal Board even though the seven day period was not complied with by them).

The Motion Picture Appeal Board is required to conduct a hearing within fifteen days of the screening by the Appeal Board. In "Rent-A-Girl", the hearing was held within seven days of screening, eight days *sooner* than required by ordinance. In "Body of a Female", the hearing also was held within seven days of screening, eight days *sooner* than required by ordinance.

The applicant must be given written notice of the ruling of the Motion Picture Appeal Board within five days of the hearing date. In "Rent-A-Girl", appellants were mailed written notice the day after the hearing, four days *sooner* than required by ordinance. In "Body of a Female", appellants were mailed written notice on the same day as the hearing, five days *sooner* than required by ordinance.

The Motion Picture Appeal Board is required to file a complaint for injunction to prevent the showing of the film

within ten days of hearing. In "Rent-A-Girl", the lawsuit was filed nine days after hearing, one day *sooner* than required by ordinance. In "Body of a Female", the lawsuit was filed four days after hearing, six days *sooner* than required by ordinance.

The Illinois Supreme Court correctly noted that (Appellants' Statement, Appendix E, p. 18a; *Cusack* v. *Teitel Film Corporation*, 38 Ill. 2d 53, 62, 230 N. E. 2d 241, 247 (Ill. 1967)):

> "As far as the administrative proceedings are concerned, the ordinance itself sets forth a schedule of [a maximum of] 50 days for the total administrative reviewing of the film—from the time of inspection by the superintendent of police or Film Review Section to the filing of a suit for injunction by the board in the circuit court."

However, "Rent-A-Girl" was submitted to the Film Review Section of the Chicago Police Department on December 3, 1965, and suit was filed by the Motion Picture Appeal Board on February 9, 1966—a total of 68 days. 23 of these days are directly attributable to appellants' delay in making request for review to the Motion Picture Appeal Board. "Body of a Female" was submitted to the Film Review Section of the Chicago Police Department on September 2, 1965, and suit was filed by the Motion Picture Appeal Board on March 11, 1966—a total of 190 days. 153 of these days are directly attributable to appellants' delay in making request for review to the Motion Picture Appeal Board. In both cases were it not for delays by appellants, administrative review would have been concluded *sooner* than the maximum time limits set forth in the ordinance.

Trial Court Proceedings.

The following factual statement is supported by these record references: Illinois Supreme Court Record No. 40124, pp. 2, 9, 13, 22, 25, 58; Illinois Supreme Court Record No. 40125, pp. 2, 9, 14, 23, 58.

The applicant has 30 days after service of summons to file a responsive pleading to the Motion Picture Appeal Board injunction action. In "Rent-A-Girl", appellants were served with summons on February 21, 1966. They could have filed their respective pleading immediately. Instead, they took 25 days, until March 18, 1966, to file their Motion to Strike and Dismiss Complaint. This 25-day delay was of appellants' own volition. In "Body of a Female" appellants were served with summons on March 18, 1966. They could have filed their responsive pleading immediately. Instead, they took 27 days, until April 14, 1966, to file their Motion to Strike and Dismiss Complaint. This 27-day delay also was of appellants' own volition.

Appellants are entitled to a hearing within five days after filing their responsive pleading. In "Rent-A-Girl", appellants filed their Motion to Strike and Dismiss Complaint on March 18, 1966. Had appellants responded promptly, this hearing could have been held on or before February 26, 1966. In "Body of a Female", appellants filed their Motion to Strike and Dismiss Complaint on April 14, 1966. Again, had appellants responded promptly, this hearing could have been held on or before March 23, 1966.

In "Rent-A-Girl", appellees announced to the trial court that they were ready to proceed. However, appellants asked for a continuance to May 2, 1966. They acquiesced in a further continuance to May 17, 1966, when the *initial* hearing was held. On May 17, 1966, the complaint was stricken with leave to file an amended complaint. The

amended complaint was filed on May 27, 1966. The *appellants moved* that a hearing on their Motion to Strike and Dismiss the Amended Complaint be held on June 22, 1966. Further continuances (acquiesced in by appellants) were by order of court until August 8, 1966, when the decree appealed from herein was entered by the Circuit Court.

Again, in "Body of a Female" appellees were prepared to proceed. Appellants continued the cause to May 17, 1966, when the *initial* hearing was held. On May 17, 1966, the complaint was stricken with leave to file an amended complaint. The amended complaint was filed on May 27, 1966. The *appellants moved* that a hearing on their Motion to Strike and Dismiss the Amended Complaint be held on June 22, 1966. Further continuances (acquiesced in by appellants) were by order of court until August 8, 1966, when the decree appealed from herein was entered by the Circuit Court.

Due primarily to appellants' lack of diligence, the elapsed time from filing of suit to entry of decree in the instant causes were 180 and 150 days respectively.

Illinois Supreme Court Proceedings.

The trial court decrees enjoining the showing of both films were entered on August 8, 1966. Appellants could have filed their notices of appeal immediately. Instead, they delayed until August 24, 1966, to file their notices of appeal.

Appellants delayed until September 28, 1966, to file their records on appeal. There is no question that appellants filed their records well within the time period prescribed by the rules of the Illinois Supreme Court. However, there is also little question that they did little to accelerate the filing of these records at the earliest possible time. Both records are short (well under 100 pages each) and con-

tain no reports of proceeding or exhibits (other than those attached to the pleadings). It is apparent that these records could have been prepared in a matter of hours. Granted that it is the responsibility of the Clerk of the Circuit Court of Cook County, Illinois, to prepare the record on appeal, there is no question that the Clerk, if urged for good cause by an appellant, can and will prepare a record immediately.

The brief and abstract of appellants were filed on October 25, 1966.

The appellants argue that it was error for the Illinois Supreme Court to grant appellees, over appellants' objections, reasonable continuances to file their brief. However, as the Illinois Supreme Court noted on oral argument, significantly appellants never moved the Illinois Supreme Court to place the cause at the head of the call of that court. Moreover, when the case was taken for advisement by the Illinois Supreme Court after oral argument, appellants did not see fit to move that court for an early decision.

The foregoing chronology demonstrates the compliance of the Chicago ordinance with the *Freedman* case, the fair application of the ordinance as to the subject films and the hypocrisy of appellants' position in *arguing* "urgency", but *acting* throughout the proceedings as if no such "urgency" exists.

ARGUMENT.

I.

CHAPTER 155 OF THE MUNICIPAL CODE OF THE CITY OF CHICAGO IS CONSTITUTIONAL.

It is difficult to ascertain from appellants' Statement whether they are arguing that the Chicago ordinance is unconstitutional or that the particular application of the ordinance to the subject films is unconstitutional. Both arguments will be answered briefly.

A reading of the Chicago ordinance readily shows its compliance with *Freedman* v. *Maryland*, 380 U. S. 51 (1964). The time limits set forth in the Chicago Ordinance are reasonable ones. Films are reviewed immediately by the Film Review Section. Within fifteen days of request to the Motion Picture Appeal Board, notwithstanding demanding professional commitments, a panel of outstanding experts in the arts, psychology and psychiatry meets to review the film. This same expert group, within fifteen days of screening again, notwithstanding demanding personal commitments, convenes and affords the applicant a full hearing. Within five days of hearing the applicant is notified of the Board's decision. Within ten days of hearing, the Motion Picture Appeal Board files a detailed complaint for injunction.

Appellants have made no showing that this timetable is arbitrary or in any way unfair to them, nor have they shown that a shorter time schedule is feasible. On the contrary, they have failed to take advantage of this timetable and have themselves prolonged these administrative proceedings for periods far in excess of the time limits set forth in the ordinance.

As shown in our "Statement of the Case", any administrative and trial court delays were directly and substantially attributable to appellants. The same is true as to many of the so-called delays before the Illinois Supreme Court.

The trial court ruled on August 8, 1966. Appellants filed their briefs and abstracts on October 25, 1966. Thus, a total of 78 days were used by appellants to present this cause to the Illinois Supreme Court. This time span is well within the rules of the Illinois Supreme Court. However, the length of time taken by defendants to present these issues to the Illinois Supreme Court is (a) inconsistent with their contention that time was of the essence in these causes, and (b) shows that they themselves must share the blame for any so-called failure to seek immediate appellate review herein.

As discussed above, this Court in *Freedman* v. *Maryland*, 380 U. S. 51, 59-60 (1964), held that the manner of incorporating "the required procedural safeguards in the statutory scheme" was for the local governmental body to decide and that this Court did "not mean to lay down rigid time limits or procedures." It is submitted that Chapter 155 affords the applicant the most expeditious review possible consistent with the requirement that all the parties involved in the reviewing process be permitted to evaluate the legal issues in a professional and competent manner. Speed *in and of itself* is not the criterion. The Chicago Ordinance, unlike any similar statutory procedure existing elsewhere, provides for review by an outstanding panel of experts (the Motion Picture Appeal Board) within a reasonably prompt period of time. If the Chicago procedure is a few days longer than some others (although it is considerably shorter than the federal customs procedures approved in *United States* v. *One Carton Positive Motion Picture Film*, 367 F. 2d 889 (2nd Cir. 1966)), the applicant

is more than compensated for this minimal delay by the assurance that the film will be reviewed with impartial expertise.

Chapter 155, coupled with General Order 3-3 of the Circuit Court of Cook County, also assures that the Circuit Court will dispose of injunction proceedings (filed by the Motion Picture Appeal Board within 10 days of administrative hearing) with prompt dispatch. Delays in the Circuit Court may only occur with the conscious acquiescence of the applicant (as demonstrated by the instant causes).

In spite of the fact that they themselves did not proceed without undue delay in processing their appeals to the Illinois Supreme Court, appellants argue that the *Freedman* requirements of prompt review apply also to the appellate review of the Circuit Court injunction order.

To construe *Freedman* so liberally would be to make impossible the adoption of any statutory system of prior restraint as expressly approved by *Freedman*. For example, in the *Freedman* case itself this Court took *almost 10 months*, from date of docketing (May 8, 1964), to render the decision (on March 1, 1965)—an almost identical time period taken by the Illinois Supreme Court in these cases. Certainly, this Court in *Freedman* was not holding, as appellants apparently are urging, that *its own* reviewing procedures were unconstitutional as applied to motion picture cases. Similarly, in *United States* v. *One Carton Positive Motion Picture Film*, 367 F. 2d 889 (2nd Cir. 1966), the Court of Appeals took *eleven months* to render its decision. In any event, the City Council of the City of Chicago is as powerless to control the appellate review procedures and policies of the Illinois Supreme Court as it is to set the rules for such procedures of this Court. This reality was recognized in *Interstate Circuit, Inc.* v. *City of Dallas*, 366 F. 2d 590, 600 (5th Cir. 1966), where the Court of Appeals for the Fifth Circuit recognized that "of course,

the City of Dallas cannot compel the state courts to afford the speedy relief requested." The Court went on to hold that (p. 601):

> "So long as the [State reviewing] courts are willing to cooperate in this manner [insuring that appeals will be heard within a reasonably prompt time], *Freedman's* requirement for speedy judicial action on the merits and on review are satisfied."

The Illinois Supreme Court by limiting the time for appellants to file their brief (per the Court's order of March 16, 1967) demonstrated that it was "willing to cooperate in this manner."

Other language in the *Freedman* opinion mitigates against appellants' proposed construction requiring the governmental body to adopt statutory procedures providing for prompt review. This Court suggested in *Freedman* (380 U. S. 51, 60) that in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957) "a model is not lacking" for a statute which sets forth "the required procedural safeguards". In *Kingsley* (which this Court decided on June 24, 1957, almost three years after the complaint for injunction was filed in the trial court), a New York statutory injunctive procedure (§ 22-a of the New York Code of Criminal Procedure (1958)) designed to prevent the sale of obscene books was upheld. Significantly, § 22-a of the New York statute makes no provision for prompt—or special—treatment of § 22-a appeals. Thus, the very statute suggested by this Court as a model for compliance with the *Freedman* procedural safeguards does not afford the prompt appellate review procedures advocated by appellants.

The common-sense reasons for refusing to adopt appellants' distorted construction of *Freedman* are many. A few of these are:

First, the very nature of the appellate process (preparing of records on appeal, filing of abstracts and formal

briefs, oral argument, consideration of the issues by several Justices) demands scholarly care, preparation and contemplation which is inconsistent with the type of "hurry-up" decision-making advocated by appellants.

Secondly, the reviewing court itself can exercise control over the case to guard against the possibility of undue delays by allowing, limiting & refusing requests for extensions of time to file briefs and abstracts (as done by the Illinois Supreme Court in the instant cause).

Finally, the rationale for prompt and special review applicable to the administrative proceeding in a case involving prior restraint is not present at the appellate level. The rationale for the *Freedman* procedural safeguards is an obvious one:

(a) The *general rule* in obscenity cases (books, magazines, photos, etc.) is that there should be no prior restraint. The obscene matter first must be distributed. Thereafter, a *criminal* trial for the *offense* of obscenity is held.

(b) Motion pictures are an *exception* to the general rule. Prior restraint (in the form of the requirement of pre-release submission of the film for licensing) in motion picture cases is legally permissible. If obscene, the motion picture is not licensed to be shown.

(c) Since the manner of testing motion pictures for obscenity is different and more restrictive (before the fact) than the manner of testing other art forms for obscenity, care at the administrative level must be taken to assure that the exercise of this formidable power of prior restraint is fair, prompt and not oppressive.

However, the basis for treating prior restraint motion picture injunction cases differently from criminal prosecu-

tions for disseminating other obscene material (*e.g.* pornographic books) is not present at the appellate level. It is a reasonable requirement that the showing of a motion picture should not be restricted unless a judge (in an injunction trial court proceeding) approves such restriction. This requirement parallels the safeguards in a criminal trial regarding other obscene materials where the trial judge makes the determination of whether or not the material is obscene. But once the trial judge, in a prior restraint proceeding, rules that the film is obscene, the distributor of the film is in the same economic position and is at the same procedural stage in adjudicating the issue of obscenity, as is the distributor of books who has been convicted of obscenity in the trial court. That is, in both instances the trial court has ruled that the material—in one instance a book, in the other a movie—is obscene. And in both instances the distributor may not disseminate his material pending appellate review. There is no constitutonal or policy reason to differentiate betwen the manner of appellate review for each of these trial court judgments of obscenity. At this procedural stage, an enjoined distributor of obscene movies is placed in no more vulnerable position than a convicted distributor of obscene books. Both must cease operations pending appellate review. Therefore, the distributor of obscene movies should be entitled to no faster—or different—appeal procedure from the trial court determination of obscenity than that afforded to the distributor of obscene books. For this reason the *Freedman* procedural safeguard rules are not applicable, nor should they be made applicable, to the appellate procedure of movie injunction cases.

The Illinois Supreme Court examined both the Chicago Ordinance and its application to the instant films in minute detail. It concluded "that the administration of the Chicago Motion Picture Ordinance violates no con-

stitutional rights of the defendants [appellants]" (Appellants' Statement, Appendix E, p. 19a, *Cusack* v. *Teitel Film Corporation*, 38 Ill. 2d 53, 63, 230 N. E. 2d 241, 247 (Ill. 1967). The Illinois Supreme Court added (Appellants' Statement, Appendix E, p. 21a, *Cusack* v. *Teitel Film Corporation*, 38 Ill. 2d 53, 64-65, 230 N. E. 2d 241, 248 (Ill. 1967)):

> "The restraint contemplated by the ordinance is to assure a submitted film of obtaining careful consideration in the light of contemporary community standards relating to obscenity. Moreover, although we recognize that delay may result from failure to follow the procedures set out by the ordinance, we found nothing in the ordinance itself which would preclude a reasonably prompt judicial determination of whether a particular film is constitutionally protected. In fact general order No. 3-3 of the Circuit Court of Cook County, cited earlier in this opinion, specifically, provides that a hearing shall be held within 5 days after the defendant answers the plaintiff's complaint, or if the defendant does not answer within 5 days after the last day allowed for the filing of an answer. We conclude that the ordinance, together with the general order, provides sufficient safeguards to assure an exhibitor of a prompt judicial hearing within the meaning of *Freedman* and thus, protects his rights to due process, and free expression."

For the foregoing reasons it is submitted that the Chicago Ordinance (a) is constitutional, and (b) was applied in a constitutional manner herein.

II.

THE FILMS ARE OBSCENE.

The instant films were viewed and found to be obscene by:

(1) the Film Review Section of the Chicago Police Department,
(2) The Motion Picture Appeal Board of the City of Chicago,
(3) The Circuit Court of Cook County, Illinois, and
(4) the Supreme Court of Illinois.

The Illinois Supreme Court Opinion (Appellants' Statement, Appendix E, pp. 26a-27a; *Cusack Teitel Film Corporation*, 38 Ill. 2d 53, 70-71, 230 N. E. 2d 241, 251-252 (Ill. 1967)) described the films as follows:

"'Rent-A-Girl', the film sought to be enjoined in case No. 40214, is described by the defendants as a documentary. The opening scene of this film shows a rather distraught but attractive young woman sitting in what is apparently the office of a District Attorney. We learn that she has recently undergone a frightening experience in associating with a brother and sister team that specializes in providing young women to satisfy the perverted needs of sexual deviates, and has decided to cooperate with the authorities in order to 'stop this sort of thing.' The District Attorney then asked her to relate her experience and through a series of flashbacks, the audience views, in scene after scene, episodes involving lesbianism, flagellation, sadism, voyeurism and group orgies, as well as the more conventional, if less imaginative heterosexual activities. The heroine realizes the error of her ways in the final scenes of the movie when she attends an orgy where she is forced to partially disrobe before the assemblage and allow her-

self to be marked with a hot branding iron on her thigh. Seeking relief from the pain she manages to crawl into a bathroom where she discovers the mutilated corpse of a woman whom we have seen whipped to death a short time before."

"Case No. 40215 involves the movie 'Body of a Female.' In this film a young man, hereafter referred to as 'X', has been attracted to a woman he has seen performing in a strip tease show. Desiring to become better acquainted, he seeks a man we shall call 'Y' to bring her to X's mansion in the country. Y then proceeds to kidnap the woman from her apartment while she is taking a bath and drives to X's mansion where she is offered a sum of money if she will remain with X for a few days. Although she agrees to this, she is not aware that X is a sadist who derives his sexual pleasure from flagellating and otherwise maiming women. Y, however, learns of X's sadistic traits and returns to the mansion to rescue the young woman. Before Y can arrive on the scene, X manages to disrobe and whip his victim and just as he is about to replace the whip with a knife, Y breaks into the room and flees with the woman. The remainder of the film concerns X's attempts to find both Y and the woman in New York City. The search is interrupted occasionally by scenes in which X is taking photograhic shots of different girls in various stages of undress. Another interruption occurs when he flogs a masseuse whom he has partially disrobed by force. When he finally manages to locate the couple, a fight ensues, X is left lying on a beach, and Y and the woman go off presumably to live happily ever after."

The Illinois Supreme Court rejected appellants' argument that the films, although dealing with matters of sex, are not obscene. That Court held (Appellants' Statement, Appendix E, pp. 27a-28a, *Cusack* v. *Teitel Film Corporation*, 38 Ill. 2d 53, 72, 230 N. E. 2d 241, 252 (Ill. 1967)):

"We are not impressed with this argument. Contrary to the defendants' assertions, our examination of these films shows that they deal not merely with sex, but with sexual deviations which can only appeal to those with a shameful and morbid interest in nudity and sex. The suggestive titles alone indicate the nature of the films and indeed the producers have apparently spared no effort to see that the spectator searching for the erotic is not disappointed."

"Both films clearly go beyond the customary limits of candor in this country. The use of the District Attorney in 'Rent-A-Girl' is a ludicrous attempt to make it appear as though the film is directed to a discussion of a social and legal problem. As such it fails. The film is nothing more than a vehicle for portraying one abnormal sexual episode after another. Although 'Body of a Female' makes no such attempt to present an aura of respectability, its flagellation scenes can appeal only to the prurient interest. On the basis of *Roth* and subsequent Supreme Court cases, and having applied the standards established therein, we find both films to be obscene and therefore beyond the protection of either the first amendment to the United States Constitution or section 4 of article II of the Illinois Constitution."

The subject films are part of the record herein (as exhibits to the amended complaints). Appellants state that these films are not obscene, but fail to show wherein the contrary opinion of every administrative and judicial body that has viewed the films is erroneous. We respectfully invite this Court to view these films (as was done in the State courts). We are confident that this Court will agree that these films are obscene.

CONCLUSION.

For the aforementioned reasons, appellees pray that their motion to dismiss or affirm the above-entitled cause on the ground that the question presented is so unsubstantial as not to need further argument be allowed.

Dated at Chicago, Illinois: November 27, 1967.

Respectfully submitted,

RAYMOND F. SIMON,
Corporation Counsel of the City of Chicago,

MARVIN E. ASPEN,
Assistant Corporation Counsel, Head of Appeals and Review Division,

Attorneys for Appellees.

APPENDIX "A".

GENERAL ORDER 3-3 OF THE CIRCUIT COURT OF COOK COUNTY.

General Order 3-3 provides that a hearing on an injunction pursuant to Chapter 155 be held within five days after the filing of a responsive pleading.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS.

GENERAL ORDER No. 3-3

SUBJECT: Motion Picture Injunctions.

IT IS HEREBY ORDERED that:

Any complaint for injunction filed pursuant to Section 155-7.2 of the Municipal Code of Chicago, or similar provision of an Ordinance of any other municipality, shall be placed at the head of the call of the Chancery Division and shall be given priority over all other causes. The Court shall set the cause for hearing within five (5) days after the defendant has answered, or if the defendant has not answered, the Court shall set the cause for hearing within five (5) days after the last day allowed for the filing of the answer.

Dated this 26th day of May A.D., 1965. This order shall be spread upon the records of this Court and published.

ENTER:

JOHN S. BOYLE,
Chief Judge, Circuit Court of Cook County.

REME COURT. U. S.

FILED
DEC 2 1967
JOHN F. DAVIS, CLERK

No. 787

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

TEITEL FILM CORPORATION, a corporation, and CHARLES TEITEL,

Appellants,

vs.

JOHN F. CUSACK, NER LITTNER, MARY MUELLER, HENRY RAGO and MATTHEW SCHOENBAUM, Members of the Motion Picture Appeal Board of the City of Chicago,

Appellees.

Appeal from the Supreme Court of Illinois.

OBJECTIONS TO MOTION TO DISMISS OR AFFIRM

ELMER GERTZ
120 South LaSalle Street
Chicago, Illinois 60603
312—RA 6-6116

LEON N. MILLER
33 North Dearborn Street
Chicago, Illinois 60602
312—RA 6-2155
Attorneys for Appellants

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 787

TEITEL FILM CORPORATION, a corporation, and CHARLES TEITEL,

Appellants,

vs.

JOHN F. CUSACK, NER LITTNER, MARY MUELLER, HENRY RAGO and MATTHEW SCHOENBAUM, Members of the Motion Picture Appeal Board of the City of Chicago,

Appellees.

Appeal from the Supreme Court of Illinois.

OBJECTIONS TO MOTION TO DISMISS OR AFFIRM

Now come appellants and object to appellees' motion to dismiss or affirm.

It is necessary to correct glaring errors of fact in appellees' brief. It is distressing to learn here, as below, that the Corporation Counsel of a great city finds it necessary to misstate facts in a fashion that one can only describe as cynical.

It is charged that appellants—not appellees, the agencies or the courts—are responsible for the great delays and resulting unconstitutional prior restraints in these proceedings. Of course, the basic answer, as made by us in our Jurisdictional Statement, is that an open-end censorship system, as here, with no built-in safeguards to eliminate long delays, however caused, is responsible for the unconstitutional results proscribed by this court in *Freedman* v. *Maryland*, 380 U.S. 51, 85 S. Ct. 734 (1965), and other guideline cases, such as *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 83 S. Ct. 631 (1963), and *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 77 S. Ct. 1325 (1957.)

Appellees even charge us with responsibility for the delays before the Supreme Court of Illinois, because, allegedly, we did not ask that court to expedite the proceedings and to place our case at the top of the calendar —*this in the face of the unquestioned fact that we repeatedly urged the court not to permit appellees to delay the proceedings by unconscionable extensions of time in filing their briefs.* (See pages 7-8 and 11-13 of Jurisdictional Statement). By letter, telegram and formal objections we called the court's attention, to no avail, to the violation of the *Freedman* guildelines and due process occasioned by the granting of these delays.

This is a touchstone for learning the truth with respect to the delays in the trial court. Appellees say that a certain rule of the Circuit Court of Cook County, Illinois, set forth in their Appendix "A," assured us of a hearing in five days. We effectively anticipated this charge in our Jurisdictional Statement when we said, at page 7:

> "The Circuit Court of Cook County has a rule purportedly requiring a hearing in movie picture censorship cases within five days of answer. This rule

does not apply to the instant situation in which there were motions to strike the complaints. It does not require the chancellor to rule upon the matter within any definite period, long or short. Both counsel for plaintiffs and the court stated that the rule was inapplicable and ignored it completely."

We want to dispose of the matter definitively by quoting from the record of the proceedings before the trial court where both appellees' counsel and Judge Harrington agreed that general order 3-3 of the Circuit Court of Cook County was inapplicable and that, in any event, it would not be followed (March 24, 1966 Report of Proceedings page 3, Supplemental Record, p. 37 (Item 19)).

"Mr. Aspen: As far as the Court is concerned, it is my understand (sic) that Judge Boyle in General Rule 3-3, *which has nothing to do with the ordinance* has said there will be a hearing within five days of either the filing of an answer—

The Court: I am going to have it changed because *we just cannot set everything aside to give priority to this kind of litigation.*" (Emphasis supplied)

Because we asked for hearings on our motions and the court set such hearings at distant dates, appellees say that we are responsible for the delays. The fact, we repeat, is that Judge Harrington, hostile to what he regarded as undesirable motion pictures and unsympathetic to the primacy of the First Amendment, placed every possible obstacle in our way. He did this in spite of the fact that we continually called to his attention the language in *Freedman* which is quoted on page 3 of Appellees motion to dismiss or affirm: "Therefore, the procedure must also *assure a prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (emphasis supplied).

On the administrative level only, there was a delay possibly attributable to the exhibitors, although, in truth, it was due to defects in the Chicago motion pictures censorship ordinance. The exhibitors delayed in asking for a review by the Motion Pictures Appeal Board because of unfamiliarity with the bi-level approach of the Chicago ordinance.

In any event, appellees expressly waived any delay at the administrative level occasioned by the fact that appellants did not comply with the seven-day schedule in the ordinance for asking a review by the Motion Pictures Appeal Board. The Corporation Counsel proclaimed this as evidence of fairness on his part when arguing another matter in the United States District Court before Judge Bernard M. Decker. (See pp. 48 and 59 ff. of the proceedings in that case (67 C 322, N.D. Ill.))

Perhaps we have not heretofore stressed sufficiently the constitutional impediments in this bi-level administrative system. The Chicago ordinance makes it possible to restrain the showing of motion pictures *without a judicial determination of the alleged obscenity of the films.* It places the burden upon the exhibitor, and not the governmental body, to take the necessary steps to secure such review. There is no obligation upon the Board or other governmental body to go to court in the absence of a prior request for a review by the exhibitor. Thus, not only the exhibitor but the public, may be deprived of its First Amendment rights.

The exhibition of a film may be suppressed for a period of up to 63 days before a judicial proceeding is even begun. This is censorship at its worst.

The showing of a film may be suppressed forever if the exhibitor—not the agency, as required by *Freedman*—does not take certain technical steps. Thus unconstitutionality is compounded.

Nothing set forth by appellees serves to contradict the language with which we began our statement of the case on page 3 of the Jurisdictional Statement:

> ". . . 58 or 63 days of delay (depending upon classification) is built into the Chicago Motion Pictures Censorship Ordinance (the Illinois Supreme Court mistakenly says it is only 50 days); unlimited delay is built into the trial court level (in these cases it took 6 months and might have taken longer); and unlimited delay is built into the appellate level (in these cases it took 12 months and might have taken longer). In all, it took 20 months for a final decision upon the constitutional status of these films, and there is nothing in the ordinance, state statutes or court rules that could have prevented longer delays—prior restraints beyond any permissible constitutional limits."

These computations of time exclude any delay occasioned by appellant's failure to ask for a review by the Motion Pictures Appeals Board. There is nothing reasonable about such a procedure in which long delays are built in and unavoidable.

It is notable that appellees do not refer to our objections with respect to the overbroad and unconstitutional scope of censorship under the Chicago system by very definition. We refer the court again to pages 4-5 of our Jurisdictional Statement, unanswered by appellees. The existence in this ordinance of these impermissible rea-

sons for censorship was compounded by the trial judge's use of an impermissible definition of obscenity in ruling upon these films, as pointed out on page 14 of our Jurisdictional Statement.

For the foregoing reasons and others set forth in our Jurisdictional Statement it is clear that the questions presented by this case are substantial, and appellants request that the motion of appellees to dismiss or affirm be denied, and that this Court note probable jurisdiction herein.

Respectfully submitted,

ELMER GERTZ
LEON N. MILLER
Attorneys for Appellants

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

TEITEL FILM CORPORATION ET AL. *v.* CUSACK ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 787. Decided January 29, 1968.

PER CURIAM.

This appeal seeks review of a judgment of the Supreme Court of Illinois which affirmed orders of the Circuit Court of Cook County permanently enjoining the appellants from showing certain motion pictures in public places in the City of Chicago, 38 Ill. 2d 53, 230 N. E. 2d 241. The questions presented are whether the Chicago Motion Picture Censorship Ordinance is unconstitutional on its face and as applied, and whether the films involved are obscene.[1]

The Chicago Motion Picture Ordinance prohibits the exhibition in any public place of "any picture . . . without having first secured a permit therefor from the Superintendent of Police." The Superintendent is required "within three days of receipt" of a film to "inspect such . . . films . . . or cause them to be inspected by the Film Review Section . . . and within three days after such inspection" either to grant or deny the permit.[2] If the permit is denied the exhibitor may within seven days seek review by the Motion Picture Appeal Board. The Review Board must review the film within 15 days

---

[1] In light of our decision, we do not reach, and intimate no view upon, the question whether the films are obscene.

[2] The ordinance was amended during the pendency of the case before the Illinois Supreme Court to require inspection within three days after submission of the films. The members of the Superintendent's Film Review Section, upon his request, "review each motion picture submitted and . . . recommend in writing to the Superintendent of Police whether to grant or deny a permit."

of the request for review, and thereafter within 15 days afford the exhibitor, his agent or distributor, a hearing. The Board must serve the applicant with written notice of its ruling within five days after close of the hearing. If the Board denies the permit, "the Board within ten days from the hearing, shall file with the Circuit Court of Cook County an action for an injunction against the showing of the film." A Circuit Court Rule, General Order 3–3, promulgated May 25, 1965, provides that a "complaint for injunction . . . shall be given priority over all other causes. The Court shall set the cause for hearing within five (5) days after the defendant has answered . . . ."[3] However, neither the rule nor any statutory or other provision assures a prompt judicial decision of the question of the alleged obscenity of the film.

The Illinois Supreme Court held "that the administration of the Chicago Motion Picture Ordinance violates no constitutional rights of the defendants." 38 Ill. 2d, at 63; 230 N. E. 2d, at 247. We disagree. In *Freedman* v. *Maryland*, 380 U. S. 51, 58–59, we held ". . . that a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to

---

[3] Comments of the trial judge in this case suggest doubt whether the trial court regarded compliance with this rule to be mandatory:

"Mr. Aspen [counsel for the City]: As far as the Court is concerned, it is my understand [*sic*] that Judge Boyle in General Rule 3–3, which has nothing to do with the ordinance has said there will be a hearing within five days of either the filing of an answer—

"The Court: I am going to have it changed because we just cannot set everything aside to give priority to this kind of litigation.

. . . . . .

"The Court: First amendment matters cannot be anymore important than any other constitutional right or any other citizen's right to have his case heard.

"As I said before, it is far more important in my judgment to take care of the broken heads and fractured legs than it is to take care of the bleeding hearts."

obviate the dangers of a censorship system . . . . To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a *specified brief period*, either issue a license or go to court to restrain showing the film . . . . [T]he procedure must also assure a *prompt final judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." (Emphasis supplied.) The Chicago censorship procedures violate these standards in two respects. (1) The 50 to 57 days provided by the ordinance to complete the administrative process before initiation of the judicial proceeding does not satisfy the standard that the procedure must assure "that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film." (2) The absence of any provision for a prompt judicial decision by the trial court violates the standard that ". . . the procedure must also assure a prompt final judicial decision . . . ."

Accordingly, we reverse the judgment of the Supreme Court of Illinois and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, agreeing that *Freedman* v. *Maryland*, 380 U. S. 51, 58–59, requires reversal of this case, base their reversal also on *Redrup* v. *New York*, 386 U. S. 767.

MR. JUSTICE HARLAN concurs in the result.

MR. JUSTICE STEWART bases his concurrence in this judgment upon *Redrup* v. *New York*, 386 U. S. 767.